

Delving Into Workers' Compensation and Occupational Disease

Seeking to Make the Complex More Easily Understood

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A Final Report on Senate Joint Resolution No. 17

**Economic Affairs Interim Committee
Representative Joe McKenney, Presiding Officer
Senator Glenn Roush, Vice Presiding Officer**

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December 2004

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Executive Summary

The Economic Affairs Interim Committee (EAIC) traditionally oversees workers' compensation issues, both those coming under its purview during monitoring of the Department of Labor and Industry (DOLI) and those accepted under an agreement with the State Administration and Veterans' Affairs Interim Committee to monitor the Montana State Fund.¹ The assignment by the Legislative Council of a study on workers' compensation simplification and clarification, sought by Senate Joint Resolution No. 17 (SJR 17), came naturally to the EAIC.

Based on SJR 17, the Committee directed staff to undertake three main tasks:

- simplify workers' compensation statutes and administrative rules;
- review statutory exemptions and exclusions; and
- address the lack of clarity arising from Montana Supreme Court decisions on the Occupational Disease Act of Montana and the Workers' Compensation Act.

Two threads of discussion developed among an ad hoc working group composed of insurance representatives, claims adjusters, trial attorneys, and DOLI workers' compensation staff, who met to provide information and recommendations on SJR 17. One thread was that tweaking workers' compensation laws for simplicity would not help as much as a complete rewrite of statutes. The other thread was a concern that any change would be problematic because those who are accustomed to working with workers' compensation laws now know where to look and what to expect; any change, they said, would cause confusion for them as well as result in possible unintended consequences or new litigation. Nevertheless, as a result of SJR 17, informal changes occurred in the ways that the DOLI and the Workers' Compensation Court provide information to potential claimants, and the EAIC agreed

¹For at least the past two interims, the Economic Affairs Interim Committee and the State Administration and Veterans' Affairs Interim Committee (SAVA) have exchanged letters in which the EAIC agrees to monitor the Montana State Fund instead of SAVA. For more details, see footnote No. 1 in the EAIC work plan at the EAIC web site: http://leg.state.mt.us/css/committees/interim/2003_2004/econ_affairs/default.asp.

to draft legislation regarding clarification and other revisions recommended by the ad hoc working group.

1. History and Workplan

In asking for a study to clarify workers' compensation laws in Montana, Senate Joint Resolution No. 17 listed a series of concerns regarding the costs of compliance with confusing, complicated workers' compensation laws and the increasing list of exemptions from the laws.² As used in this report and unless otherwise stated, the general reference to workers' compensation laws or statutes will include both the Workers' Compensation Act and the Occupational Disease Act of Montana (Title 39, chapters 71 and 72, respectively), because under 39-72-301, MCA, those who are subject to the Occupational Disease Act of Montana are "all employers and employees who now are or hereafter will be subject to the provisions of the Workers' Compensation Act of the state of Montana". Similarly, 39-72-310, MCA, states that the compensation plans provided under the Workers' Compensation Act are considered to also provide full coverage for claims under the occupational disease statutes. However, discussions of Montana Supreme Court decisions in the report delineate whether the subject is workers' compensation (injury) or occupational disease.

Senate Joint Resolution No. 17 listed a series of concerns regarding the costs of compliance with confusing, complicated workers' compensation laws and the increasing list of exemptions from the laws.

Constitutional Attention — Workers' compensation laws have special recognition in Article II, section 16, of the Montana Constitution, which provides Montana workers covered by workers' compensation laws with an "exclusive remedy" in exchange for the constitutional right of "full legal redress for injury incurred in employment". Exclusive remedy means that in exchange for prompt, no-fault medical and wage-loss assistance, a worker agrees not to sue an employer for a covered

²Appendix A: Senate Joint Resolution No. 17.

workplace injury or occupational disease. Often referred to as a *quid pro quo* exchange of rights and remedy, workers compensation laws are "intended to serve employees by relieving them of the responsibility of proving employer negligence and to serve employers by relieving them of liability from common-law suits involving negligence."³ Various court decisions have addressed the scope of the exclusive remedy rule.⁴

Differences Between Injury and Disease — Workers' compensation laws have existed since 1915. The original act distinguishes between an injury caused by a "fortuitous event" and one contracted by disease.⁵ In 1937, the Legislature created a separate chapter under Title 39, MCA, to address benefits for one type of occupational disease, silicosis, defined as a "fibrotic condition of the lungs due to inhalation of silica dust".⁶ The 1959 Legislature created a separate chapter for occupational disease, which it defined as "all diseases arising out of or contracted from and in the course of employment". This retained the 1915 workers' compensation distinction between an identifiable event resulting in injury and multiple events that cause what is termed "disease". The 1987 Legislature later revised the 1959 definition to the current version contained in 39-72-102, MCA:

"Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition

³See Eddye McClure, "The Montana Workers' Compensation Act and the Applicability of the Exclusive Remedy Rule", Legislative Services Division, February 2000.

⁴*Ibid.*

⁵For more information on workers' compensation and occupational disease history and Montana Supreme Court decisions regarding differences in the workers' compensation and occupational disease statutes, see Eddye McClure, "Senate Joint Resolution No. 17 and the Occupational Disease Act", Legislative Services Division, February 2004, and Eddye McClure, "Legislative History of Major Workers' Compensation Legislation Affecting Benefits Levels and Claim Frequency, 1987-99", Legislative Services Division, January 2000.

⁶Title 39, chapter 73, part 1, MCA, addresses silicosis. Definitions are contained in 39-73-101, MCA.

arising from emotional or mental stress or from a nonphysical stimulus or activity.

Frustrations Expressed in SJR 17 — Confusion associated with workers'

compensation statutes costs time and money for employers and claimants trying to understand the laws, according to the

Independent Insurance Agents of

Montana, who asked Senator Jon Tester

to sponsor SJR 17 in the 2003

Legislature. The confusion has developed

from several fronts. For example, one

frequent question concerns who must be

covered by workers' compensation. Over the years, the Legislature has passed an

expanding number of exemptions to the general rule stated in 39-71-401(1) that "the

Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to

all employees, as defined in 39-71-118". The definition of employee in 39-71-118,

MCA, excludes certain people. In 39-71-401(2) at least 22 occupations are exempt

from obtaining workers' compensation coverage. Another perceived need, outlined in

SJR 17, is the clarification and simplification of the workers' compensation statutes,

which would help with administration of the laws. SJR 17 specifically excluded

changes in benefits but not changes in terms or concepts. Clear, concise, and

understandable laws were the objectives sought for the workers' compensation

statutes under SJR 17. Key to understandability is the recognition that some

Montana Supreme Court decisions in 2003 had declared portions of the laws

unconstitutional. Inconsistency between case law and statutory law contributes to

confusion, particularly in a system intended to be "primarily self-administering" with

minimal need for lawyers and the courts.⁷

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⁷The declaration of public policy for the Workers' Compensation Act includes the following provisions in 39-71-105(3): "Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities".

SJR 17 Workplan — After the Legislative Council assigned SJR 17 to the EAIC in May 2003, the EAIC at its first meeting of the interim on June 11, 2003, reviewed a workplan that called for examining:

- statutes and administrative rules
 - for clarity or duplication; and
 - for reasons underlying adoption and whether they meet workers' compensation policies;
- recent decisions from workers' compensation/occupational disease court cases
 - differences between workers' compensation and occupational disease;
 - exclusive remedy; and
 - types of cases/sections of law or administrative rule being challenged;
- exemptions, terms, and definitions
 - rationale (judicial decisions, statutes, changes in work practices); and
 - needs, based on input from stakeholders; and
- treatment of workers' compensation and occupational disease in other states.

Stakeholder Input — The first EAIC meeting also featured observations from Workers' Compensation Court Judge Mike McCarter, representatives of each of the insurance plans offering workers' compensation insurance (Plans 1, 2, and 3), and representatives from the Montana Trial Lawyers' Association, the Montana AFL-CIO, and the Independent Insurance Agents of Montana. Among their recommendations for the SJR 17 review were to recognize the importance of:

- changes that will last, because frequent alterations increase confusion;
- conciseness, which reduces the need or opportunity for courts to interpret statutory language;

- impacts on existing statute coordination, which needs to be considered for recommended changes;
- the limited nature of SJR 17, which excluded impacts on benefits;
- simplicity in helping employers and employees understand a system that statute says should "minimize reliance upon lawyers and the courts"; and
- a common reference for claimants who are faced with different applicability dates, depending on when their injury occurred or which Supreme Court cases provided retroactivity, as well as different treatments under occupational disease laws and workers' compensation laws.⁸

Three Main Tasks — With the EAIC's approval, Eddy McClure, staff attorney for SJR 17, convened an ad hoc working group of insurance representatives, claims adjusters, trial attorneys, and DOLI workers' compensation staff. Their charges were to address solutions for the three main components of the SJR 17 study:

- simplification and clarification of statutes and administrative rules;
- review of workers' compensation exclusions and exemptions and their history; and
- consideration of how to address Montana Supreme Court decisions declaring certain portions of statutes to be unconstitutional.

Other Parallel Studies — Over the course of the EAIC's seven meetings, the members heard recommendations from the ad hoc working group and received updates on two studies related to workers' compensation:

- one by DOLI on independent contractors, under SB 270; and
- one by the Montana State Fund on the role of the State Fund and whether to sell all or part of the old or new funds and create an assigned risk pool, a study required by SB 304.

Related Business — The EAIC also heard from representatives of the downhill ski industry at two meetings. They asked that language be made more concise for an

⁸See Minutes for June 11, 2003, EAIC meeting. Minutes are available at the following website: http://leg.state.mt.us/css/committees/interim/2003_2004/econ_affairs/agenda_minutes.asp.

exclusion under the definition for employees—39-71-118(2)(a), MCA—that was intended to prevent ski instructors from receiving workers' compensation if they are injured while "not performing prescribed duties". (The EAIC took no action on this request.)

2. Ad Hoc Working Group

To help address the SJR 17 study in a manner that reflected concerns of stakeholders, Eddy McClure, as staff attorney for the SJR 17 study, convened an ad hoc working group of insurer representatives, including representatives of Plan 1 "self-insureds"; workers' compensation attorneys for claimants and insurance companies; staff from DOLI's Employment Relations Division, which includes workers' compensation units; and claims adjusters.⁹ Their first meeting as a group took place on September 29, 2003, and featured a review of SJR 17 and updates on meetings that DOLI and claims adjusters had been having separately to review workers' compensation statutes. Prior to the working group's meeting, DOLI staff met almost weekly from June until late September 2003 for reviews, one by one, of the workers' compensation statutes and the accompanying administrative rules. Similarly, a group of claims adjusters, called together by Senator Vicki Cocchiarella (who is a claims adjuster and not a member of the EAIC), met in Missoula at various times during the summer of 2003 to review the workers' compensation statutes and to make recommendations for changes. At the September 29 meeting both groups presented their recommendations to the broader group of stakeholders. The outcome of that meeting resulted in an overall recommendation to the EAIC at its October 23 meeting for three different presentations and possible legislative approaches:

- workers' compensation statutes that are redundant or in need of revision for clarity or simplification;

⁹The e-mail list for the workers' compensation ad hoc working group, which includes people who had an interest in the study but did not always attend each meeting, consisted of: Plan 1 representative Shawn Bubb; Plan 2 representatives Jacqueline Lenmark and Larry Jones; Plan 3 representative (State Fund) Nancy Butler; claims adjusters Senator Vicki Cocchiarella, Chuck Driscoll, Michelle Fairclough, and Mike Marsh; claimants' attorneys Dean Blackaby and Dick Martin; union representatives Jerry Driscoll and Don Judge; independent insurance agent representative Roger McGlenn; and DOLI staff Kevin Braun, Karen Doig, David Elenbaas, Diana Ferriter, Carol Gleed, Barb Gullickson, Jeanne Johns, Jerry Keck, Keith Messmer, Nikki Noland, and Charlotte Payne. Claims adjusters Susan Lake and Joyce Blatherwick, along with vocational rehabilitation counselor Deb Peterson, CRC, CCM, CDMS, of Missoula, also attended some of the meetings of the ad hoc working group as well as all the claims adjusters' meetings in Missoula.

- reports on exemptions and their background; and
- court decisions on occupational disease and workers' compensation.

Chapters 3 through 6 of this report address each of these topics, along with the legislation proposed in relation to them.

The ad hoc advisory group continued to meet over the interim, convening on February 23, April 14, June 10, and July 15 of 2004 to address one or another of the issues. The group also corresponded and reviewed proposed legislation by e-mail.

Despite efforts by EAIC staff, including telephone calls to selected claimants who contacted the Workers' Compensation Court along with requests that claims adjusters or workers' compensation attorneys ask their clients to testify, only one claimant testified at an EAIC meeting. He commented on the length of time involved in processing his case, which meant that he had to file bankruptcy while he was unable to work.¹⁰ One claimant responded by e-mail with papers he had written for classes at the University of Montana and with references to briefs filed before the Montana Supreme Court.¹¹ His materials focused primarily on benefits, which was a subject outside the scope of the SJR 17 study, but his e-mail included the following recommendations:

- provide claimants with better access to legal help;
- guarantee truly independent medical exams and examiners by having DOLI appoint independent medical examiners;
- guarantee independent vocational rehabilitation counselors by having DOLI appoint the vocational rehabilitation counselors; and
- avoid setting goals for DOLI mediation units because the goals can encourage settlements and influence outcomes.

¹⁰See Minutes for January 23, 2004, EAIC meeting.

¹¹E-mail from Lennie Thompson, February 3, 2004. Also, see Thompson v. Liberty Northwest Insurance Corporation, 2004 MT 166N (2004), in which the Supreme Court supported the Workers' Compensation Court ruling against Thompson.

3. Simplification: Revising References and Repealing Redundancies

At the October 23, 2003, EAIC meeting, Jerry Keck, administrator of DOLI's Employment Relations Division, presented one informal and one formal set of recommendations.

The Informal Approach — The informal changes represented what DOLI could do without legislative action, including the use of a cross-referenced index in materials that DOLI provides to the public. This recommendation came from the claims adjusters, one of whom provided an index for DOLI to use as a template for indexing its website or "blue book" compilation of workers' compensation statutes and administrative rules.¹² Mr. Keck also said that, as a result of working group recommendations, DOLI would put definitions in bold lettering to help those unfamiliar with workers' compensation statutes identify definitions outside of the usual definition sections. The DOLI staff review of administrative rules recommended deleting two administrative rules, ARM 24.29.607 and ARM 24.29.1408, which overlapped or conflicted with 39-71-1106, MCA. The code section specifies that an insurer may terminate compensation benefits if a claimant is "unreasonably refusing" to cooperate with medical treatment procedures.

The Formal Approach — The formal recommendations for legislative action were:

- changes that had the general, immediate consensus of the ad hoc working group, such as repealing redundant statutes or those directing the state to undertake activities intended only for the federal government (as in negotiating with Canada on workers' compensation reciprocity under 39-71-426 through 39-71-428, MCA); and

¹²Exhibits at the October 23, 2003, EAIC meeting include the lists containing the ad hoc working group's agreed-on changes and those statutory changes needing more comment (Exhibit No. 14) plus the index (Exhibit No. 15). These are available for review at the Legislative Services Division offices.

- changes on which the ad hoc working group would continue to meet in an effort to obtain consensus.

Both groups of statutes resulted in proposed legislation advanced by the EAIC as committee bills. (See Chapter 6 for descriptions of LC 188 and LC 189.)

4. Reviewing Workers' Compensation Exclusions and Exemptions

The January 23, 2004, meeting of the EAIC featured a review of the 22 occupations that the Legislature has exempted from the requirement under 39-71-401(1) for workers' compensation coverage. Staff Research Analyst Pat Murdo reviewed the history of exemptions under 39-71-401(2), MCA, and how other states handled similar exemptions.¹³ Her summary stated that exemptions generally received legislative approval in one of two ways—either as a result of direct advocacy by proponents or as part of major revisions to the Workers' Compensation Act. Her research indicated that when major revisions to the Act also included new exemptions, the sponsor concentrated on the nonexemption aspects of the bill and rarely included witnesses testifying in favor of the exemption. Some exemptions also exist because federal laws control certain occupations, such as jobs tied to railroads, or situations, such as jobs for businesses owned primarily by Indian tribal members and operating on a federally recognized reservation.

What Insurance Applies for

Exempt Workers? — At the January EAIC meeting, Bob Biskupiak, president-elect of the Independent Insurance Agents of Montana, reviewed a letter from the organization's executive director. That letter pointed out to EAIC members the

importance of considering whether exemptions complied with the public policy declaration of 39-71-105, MCA, and noted the confusion that can arise for employers seeking to comply with 39-71-401, MCA. The letter stated:

Exemptions generally received legislative approval in one of two ways—either as a result of direct advocacy by proponents or as part of major revisions to the Workers' Compensation Act.

¹³See Appendix B: Exemptions in 39-71-118(2) and 39-71-401(2), MCA.

The Independent Insurance Agents' Association of Montana believes that over the years the Montana Legislature has gotten away from the original public policy by passing numerous exemptions to the Workers' Compensation laws. We believe these exemptions have been in conflict with the statutory Public policy stated in 39-71-105(1). These exemptions we believe create unintended problems, concerns and costs to the employer and employees.¹⁴

Among the concerns and costs cited in the letter were the loss of the no-fault (exclusive remedy) system if an injured employee can sue for damages and the concern that general liability policies do not cover employers of exempt employees without an amendment to the policy. The letter noted that independent insurance agents "may also have to advise them [employers] that coverage may not be available in any form for these exposures".¹⁵

Options for Exemptions — At the May 5, 2004, meeting, the EAIC reviewed a list of options for dealing with exemptions, which were presented in a report entitled "Exemptions: Do They Make Sense In A No-Fault Workers' Compensation System?".¹⁶ Participants in the working group made no recommendations for changing the exemption list and noted that such a decision was a political one, better left to EAIC members to address. To comply with SJR 17's focus on exemptions, EAIC staff supplied the members with six options:¹⁷

- Option 1: Remove all exemptions (except those for which federal law supersedes state law) and require coverage.
- Option 2: Retain exemptions selectively.

¹⁴Letter from Roger McGlenn, executive director of the Independent Insurance Agents of Montana, Inc., "Comments in Regard to Senate Joint Resolution 17", January 21, 2004. Exhibit No. 6 at the January 23, 2004, EAIC meeting.

¹⁵*Ibid.*

¹⁶Pat Murdo, "Exemptions: Do They Make Sense In A No-Fault Workers' Compensation System?", Legislative Services Division, April 2004.

¹⁷See Exemption Options Worksheet, Exhibit No. 11, at the May 5, 2004, EAIC meeting.

- Option 3: Require coverage for all but independent contractors and federally exempted employees.
- Option 4: Move all nonfederal exemptions, except for independent contractors, from 39-71-401, MCA, into definitions of workers and volunteers in 39-71-118, MCA.
- Option 5: Consolidate exemptions that are similar, but keep all exemptions.
- Option 6: Make no change.

After the EAIC requested draft legislation on Options 4 and 5, discussions by EAIC staff and DOLI workers' compensation staff resulted in questions about the feasibility of Option 4. The reason for the difficulty was that many, if not most, of the occupations exempted in 39-71-401(2) are employee types of occupations. Excluding the people who work in those occupations from the definition of "worker" or "employee" by moving the references to 39-71-118 could result in unintended consequences under other statutes.

Work proceeded on Option 5, with staff preparing LC 9899 by taking language regarding elections for coverage from 39-71-118, MCA, and consolidating that language with similar, related references to elections for coverage in 39-71-401, MCA. LC 9899 also moved the definition of "volunteer", "volunteer firefighter", and "volunteer hours" into the definition section, 39-71-116, MCA. LC 9899 also proposed creating a separate notification section from a subsection of 39-71-401, MCA, that requires employees to post notice about workers' compensation insurance.

Despite DOLI and EAIC staff concerns about the workability of Option 4, EAIC staff put together LC 9896 because the EAIC had asked for two options. LC 9896 selectively removed from 39-71-401(2) and transferred to 39-71-118, MCA, only the references to sole proprietors, direct sellers, and real estate, securities, or insurance salespersons paid solely by commission and without a guarantee of minimum earnings. DOLI staff suggested changes to LC 9899 prior to the EAIC's June 30-July 1, 2004, meeting, but the draft of LC 9896 was not available for comment by the full ad hoc working group prior to the EAIC meeting.

At its June 30-July 1, 2004, meeting, the EAIC heard concerns from representatives of Plan 2 and Plan 3 that LC 9896 and LC 9899 could possibly result in unintended consequences. They asked for more time to consult on the bill drafts. The EAIC asked for the bill drafts to be consolidated. The resulting bill draft, LC 9896, retained the consolidations of LC 9899 but added changes regarding independent contractors. The exemption for salespersons working on commission remained unchanged from current statute. The revised bill draft retained LC 9896's approach to clarifying the term "working" member of a partnership, limited liability partnership, proprietorship, or limited liability company by substituting for the words "working member" the language from 39-71-118(5) regarding members "devoting full time". Other revisions consolidated references to elections for coverage by taking the references from 39-71-118 and inserting them into similar references in 39-71-401.

Prior to the September 7, 2004, EAIC meeting, the SB 270 Study Committee on independent contractors agreed to language for addressing independent contractor status that took a different approach from that provided in LC 9896 (see Chapter 6). The EAIC adopted the SB 270 Study Committee's proposed independent contractor bill as a committee bill, LC 358. Concerns voiced by Senator Sherm Anderson about LC 9896's proposed wording change from "working member" to a member "devoting full time" highlighted the problems of trying to consolidate references and definitions within the statutes. Senator Anderson pointed out that he was a working member of both a limited liability company and a limited liability partnership but he did not devote full time to one or the other but to both. As a result of the concerns about the revisions to the language on working members of partnerships and the differing approaches to the independent contractor provisions, the EAIC decided not to support changes to the exemption statutes in LC 9896. The independent contractor bill draft, LC 358, ended up being the major change to the exemption statutes recommended by the EAIC.

5. Addressing Montana Supreme Court Decisions on Occupational Disease

Reference to recent Supreme Court rulings is indirectly required by SJR 17's directive to clarify workers' compensation laws because these laws cannot now be understood without taking into account Montana Supreme Court decisions. The need to reference court decisions as well as statutes before being fully informed of the meaning of the law means that a claimant or an employer who does not realize the implications of case law is unlikely to be served sufficiently by workers' compensation laws without receiving assistance from an attorney. Minimizing the use of attorneys is one of the stated policy objectives in 39-71-105(3), which suggests that the Legislature may need to address Montana Supreme Court decisions if the laws are to be "self-administering" as described in the policy statement.

As staff attorney for SJR 17, Eddy McClure presented a report to the EAIC at the March 2004 meeting addressing the history of the Workers' Compensation Act and the Occupational Disease Act of Montana.¹⁸ In her review of Montana Supreme Court decisions that found that certain occupational disease statutes unconstitutionally violated the equal protection guarantees of Article II, section 4, of the Montana constitution,¹⁹ Ms. McClure noted that the changes in definitions regarding when a condition developed took the emphasis away from the worker's medical condition. For example, Ms. McClure noted that in Henry v. State Fund, "According to the Court, there was no rational basis for treating a worker who contracted a herniated disc during one shift differently than a worker who contracted a herniated disc over more than one shift."²⁰ Similarly, the Court stated that the

¹⁸Eddy McClure, "Senate Joint Resolution No.17 and the Occupational Disease Act", Legislative Services Division, February 2004.

¹⁹These include equal protection cases raised in Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989), Henry v. State Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), Stavenjord v. State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (2003), and Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003).

²⁰McClure, *op. cit.*, 2004, p. 8.

The Montana Supreme Court has found that certain occupational disease statutes unconstitutionally violated the equal protection guarantees of Article II, section 4, of the Montana constitution.

Legislature's policy of getting people back to work as soon as possible meant there was no rational basis for providing higher benefits, including access to rehabilitation, under one type of compensation than under another.

The report provided pros and cons of options aimed at addressing the Court decisions. Among the options were:

- Option 1: Making no changes in the Occupational Disease Act.
- Option 2: Merging all or a portion of the Occupational Disease Act into the Workers' Compensation Act.
- Option 3: Addressing only those parts of the Occupational Disease Act identified by the Montana Supreme Court as having legal problems.
- Option 4: Rewriting and simplifying the Occupational Disease Act prior to merging the Act with the Workers' Compensation Act.

Opinions on Merger Option — Based on straw polls taken at a February 23, 2004, meeting of the ad hoc working group, development of Option 2 had more votes than other options, with Option 3 the runner-up. Members of the ad hoc working group gave descriptions of each option at the EAIC's March 11, 2004, meeting. Larry Jones of Liberty Northwest Insurance captured the EAIC's attention by saying that a lay person could not possibly understand the workers' compensation system by reading just the statutes and that an attorney relying just on statutes would be committing "malpractice". Mr. Jones noted that the Montana Supreme Court's rulings on occupational disease found that those claimants were to have the same procedural safeguards and the same benefit entitlements as claimants under the Workers' Compensation Act.²¹ He said Option 2 would avoid unintended tort liability issues for employers by incorporating references to occupational disease into the

²¹See Minutes from the March 11, 2004, EAIC meeting.

Workers' Compensation Act. Among his other suggestions were to deal with filing period differences between workers' compensation and occupational disease claims and to extend the provisions of the "employer responsibility" statute under the occupational disease chapter of law to the workers' compensation chapter. Treating everyone with the same procedural requirements and same benefit levels, he said, would greatly reduce the likelihood of litigation.

Opinions on Restricted Response — Jacqueline Lenmark of the American Insurance Association, in presenting the option for a limited recognition of the court rulings, said Option 3 would affect only those statutes targeted as unconstitutional by the Supreme Court.²² For example, 39-72-701, MCA, could be expanded to include compensation for permanent partial disability and vocational rehabilitation, which currently is allowed under the Workers' Compensation Act but not under the statutes governing occupational diseases. Another change described by Ms. Lenmark would allow lump-sum payments under the occupational disease statutes, matching the permission offered under the workers' compensation statutes. Ms. Lenmark noted that the National Council on Compensation Insurance (NCCI), which sets workers' compensation rates in Montana and many other states, already had accounted for changes in rates based on the Supreme Court decisions. The major impact was from the decision in Stavenjord v. State Fund, which resulted in a 1.1% overall price increase recommendation from NCCI.

More Information Needed — Recognizing that the ad hoc working group had not reached consensus on how to handle the Supreme Court decisions on occupational disease, the EAIC asked for further information, including costs, and bill drafts for Options 2 and 3. At the EAIC's May 2004 meeting, Nancy Butler of the Montana State Fund distributed an actuarial analysis of projected compliance costs for Option 2 or 3. The analysis prepared by NCCI stated:

²²Ms. Lenmark noted that, although she had agreed to present Option 3, she supported no change in the statutes. The American Insurance Association, which she represented, supported first Option 1 (no change) and then Option 3 (minimal change).

- without changes to current laws, awards for occupational disease could continue to be higher than statutes currently allow as a result of the court decisions;
- with codification of the court decisions in the occupational disease statutes, a "minor decrease in litigated cases" could occur; or
- with merger of the occupational disease and workers' compensation statutes, litigation might increase 10% to 20%, which could increase system costs by 0.2% to 0.8% or roughly \$0.4 million to \$1.8 million.²³

At its May 5, 2004, meeting the EAIC voted to pursue draft legislation on two bills. Option 1 would merge the two relevant portions of the occupational disease and workers' compensation statutes. Option 2 would codify the Supreme Court decisions into the occupational disease statutes. Senator Anderson, saying he preferred no change, voted against both options because of his concern that changes to the laws might not adequately address the differences between occupational disease and injury. At the EAIC's June 30-July 1, 2004, meetings, the ad hoc working group asked for more time to see if a consensus could be developed in the group for addressing both options.

At the September 7, 2004, meeting, Larry Jones of Liberty Northwest Insurance told the EAIC that although he had been a strong advocate of the merger option, he agreed with other insurers that the situation was not a crisis. He noted that uncertainties continue, and he suggested a "do nothing" option. Both Ms. Lenmark of the American Insurance Association and Ms. Butler of Montana State Fund agreed, as did Shawn Bubb of the Montana Schools Group Insurance Authority.²⁴ Another member of the ad hoc working group, Jerry Driscoll of the AFL-CIO, questioned what had happened to the agreement to support a targeted codification of the Supreme Court decisions. He questioned whether the insurance companies were betting on the Montana Supreme Court overturning the Henry, Stavenjord, and Schmill decisions impacting occupational disease after the November election.

²³National Council on Compensation Insurance, Inc., "Analysis of Montana Occupational Disease Draft Proposals", undated. Presented to the May 5, 2004, EAIC meeting, Exhibit No. 9.

²⁴Shawn Bubb of the Montana Schools Group Insurance Authority said that he also was speaking on behalf of George Wood of the Montana Self-Insurers Association.

During questioning, Senator Mike Taylor asked whether the proposed bill draft, LC 6666 (now LC 353), would add costs to the system. He learned that the National Council on Compensation Insurance had already factored in the costs. In response to a question from Representative Joe McKenney regarding why the insurers' representatives felt a "do nothing" approach was most reasonable, Mr. Jones pointed to what he called an "activist Supreme Court" changing laws "with some regularity". He noted that the insurers' representatives would continue to meet but that they had concerns about unintended consequences of changing the laws. Both Senator Taylor and Representative McKenney noted that a committee-sponsored bill might help to get agreement on an issue that Senator Mangan and Representative Jim Keane both called a stop-gap measure. The vote to adopt the bill draft LC 6666 (now LC 353) as a Committee bill was 6-2, with Senator Anderson and Representative Scott Mendenhall opposed.

6. Proposed Legislation

Simplification and Clarification — The EAIC agreed at its June 30-July 1, 2004, meeting to request draft legislation recommended by the ad hoc working group for simplifying and clarifying certain workers' compensation statutes based on two criteria: those that were confusing because of terminology and those that clarify and consolidate operational criteria in the statutes and remove redundancies. The reason for the two bills is that support for one approach may not mean support for the other.

SB 8 or LC 188 (previously known as LC 5555)

This bill seeks to clarify how lump-sum payments are addressed and who pays benefits if there is a dispute among insurers, along with other clarifications. Explanations of the changes are on the Economic Affairs Committee website.²⁵

HB 126 or LC 189 (previously known as LC 5560)

Seeks to make Workers' Compensation Act terminology consistent, removes moot or redundant statutes, and repeals the occupational deafness compensation statutes (Title 39, chapter 71, part 8). This bill also standardizes the reference to the state's average weekly wage.

The rationale for repealing the occupational deafness compensation statutes is to pay the same benefits for occupational deafness whether the deafness is the result of prolonged exposure to noise in employment or the result of a traumatic hearing loss. This rationale is consistent with recent Montana Supreme Court cases concerning occupational disease benefits.

²⁵For more details regarding each bill draft, see explanations posted for LC 5555 or LC 5560 under June 30-July 1, 2004, meeting materials on the EAIC web site: http://leg.state.mt.us/css/committees/interim/2003_2004/econ_affairs/meeting_materials/6_30.asp

Dealing With Exemptions — One of the biggest groups seeking exemptions under the Workers' Compensation Act is the group of independent contractors, who work in myriad areas with a large number of those contractors involved in building construction. A study by Hays Companies for DOLI reported in October 2003 that of seven states with independent contractor registration and exemption procedures similar to Montana's none had as many independent contractors as a percentage of the workforce.²⁶ Montana's 29,204 registered independent contractors in 2002 amounted to 8% of the state's workforce.²⁷ After presenting his report to the SB 270 Study Committee, Brandon Miller of the Hays Companies gave a similar report to the EAIC. The report said that Florida, with 162,503 exempt independent contractors, was the next highest at 2.4% of its workforce.²⁸ SB 270, sponsored by Senator Dan Harrington in the 58th Legislature (2003), required DOLI to appoint a committee to define the term "independent contractor" and to "study the issues related to exemptions of independent contractors from coverage under the Workers' Compensation Act".²⁹

The Study Committee presented its recommended bill draft to the September 7, 2004, EAIC meeting and asked the members to sponsor the draft as a committee bill. Study Committee members testifying on behalf of the draft noted their

²⁶Brandon Miller, "Montana Independent Contractor Best Practices Report", Hays Companies report, October 2003. Exhibit No. 13, at the October 23, 2003, EAIC meeting.

²⁷The number of independent contractors in Montana is growing. An October 2003 report by Maggie Connor of DOLI to the SB 270 Study Committee, "Independent Contractors in Montana", listed 20,025 independent contractor exemptions in FY 1999 and 29,638 in FY 2003.

²⁸Miller, *op. cit.*

²⁹SB 270 Study Committee members were: John Andrew, committee facilitator and chief of DOLI's Labor Standards Bureau; Webb Brown, the Montana Chamber of Commerce; Nancy Butler, the Montana State Fund; Dave Cogley, a building contractor; Jerry Driscoll, the Montana State AFL-CIO; Cary Hegreberg, the Montana Contractors Association; Riley Johnson, the National Federation of Independent Business; Larry Jones, Liberty Northwest Insurance; Jerry Keck, DOLI's Employment Relations Division; Jacqueline Lenmark, the American Insurance Association; Larry Mayo, the Montana Building Trades Council; Jason Miller, the Pacific Northwest Regional Council of Carpenters; James Nys, Personnel Plus Consulting Association; Byron Roberts, the Montana Building Industry Association; Carl Schweitzer, the American Subcontractors Association of Montana; Brian Smith, the Montana Motor Carriers Association; and Bob Worthington, the Montana Municipal Insurance Authority.

expectation that the bill would bring certainty to the question of when is a person an independent contractor rather than an employee.

SB 108 or LC 358 (from the SB 270 Study Committee) would require:

A points-driven application process for an independent contractor's exemption.

Field inspections by DOLI to address the duty for the department to make certain that independent contractors are not employees.

An increase in the registration fee from \$17 for a 2-year exemption to a fee to be set by DOLI rule to cover the cost of more intensive application screening, field inspectors, and education (expected to be \$100 to \$125 every 2 years).

An educational process to inform employers and independent contractors that the employment relationship requires both components of what is called the "A-B test". This test, listed in 39-71-120, MCA, requires an independent contractor "to be free from control or direction over the performance of the services [rendered], both under the contract and in fact" and to be "engaged in an independently established trade, occupation, profession, or business".

A study reported that of seven states with independent contractor registration and exemption procedures similar to Montana's none had as many independent contractors as a percentage of the workforce.

Questions from the EAIC focused on: (1) whether the new provisions would prevent a homeowner from being sued if a contractor working on the home is hurt and not covered by workers' compensation insurance, and (2) the costs of implementation. A homeowner's potential for being sued is unresolved by the bill draft except when the injured worker is a subcontractor who either must be an independent contractor or an employee, according to Kevin Braun, DOLI's chief legal counsel. For the costs of

implementation, DOLI's Jerry Keck estimated a need for 4 to 6 more employees and funding for education. These needs, he said, would require the independent contractor fee to increase from \$17 paid now for a 2-year exemption to \$100 to \$125 every 2 years.

EAIC members praised the SB 270 Study Committee for its work and voted unanimously to support the bill draft as a committee bill.

Addressing Court Decisions — The EAIC also adopted as committee legislation at its September 7, 2004, meeting the bill draft LC 6666, which is now SB 12 or LC 353.

SB 12 or LC 353 (formerly known as LC 6666):

Provides a preamble that describes the relationship between recent Montana Supreme Court decisions and the public policy section of the Workers' Compensation Act.

Makes applicable under the Occupational Disease Act of Montana the Workers' Compensation Act statutes referring to the award, regulation, and limitations on costs and attorney fees (39-71-611 through 39-71-614, MCA). Also makes applicable to claimants under the occupational disease statutes the provision in 39-71-741, MCA, allowing compromise settlements and lump-sum payments. (Repeals 39-72-711, MCA, which disallows compromise settlements or lump-sum payments, and 39-72-712, MCA, which regulates attorney fees.)

Includes under 39-72-701, MCA, comparable treatment to Workers' Compensation Act beneficiaries for those claimants considered to have temporary or permanent partial disability due to occupational disease (implementing the Stavenjord decision) as well as those who are eligible for rehabilitation benefits (implementing the Henry decision).

Repeals limits on compensation benefits under the occupational disease statutes that are not applicable under the Workers' Compensation Act (39-72-405 and 39-72-703, MCA).

Removes the apportionment provisions (implementing the Schmill decision) of 39-72-706 and 39-72-707, MCA.

7. Other Areas of Interest — State Fund and Independent Contractor Studies

Workers' compensation and occupational disease issues are like pressing on a balloon —pushing on one side just moves the air around inside and creates a bulge elsewhere. While the EAIC undertook a simplification study of workers' compensation and occupational disease statutes, another group, created by SB 270, undertook a study related to independent contractors. Yet another group, created under SB 304, began studying the role of the Montana State Fund, including whether to sell all or part of the State Fund and create an assigned risk pool. Whether the separate approaches were more effective than a combined study is not clear, although the scope of each study occupied multiple meetings in the interim and meant that many of the same members of the EAIC's ad hoc working group spent time—often volunteer time—attending meetings and reviewing material for each study.

SB 270 Study — This study of independent contractors, assigned to DOLI by SB 270 in the 2003 Session, produced a bill draft after much debate by a 17-member group composed of representatives of business and labor, contractors, workers' compensation insurers, and two DOLI staff. The group debated between making workers' compensation insurance mandatory for independent contractors and setting criteria that would withstand court review and also serve as conclusive proof that the worker was an independent contractor and not an employee.³⁰ The latter approach won.

The group labored under the Montana Supreme Court's dismissal of language in 39-71-401(3)(c) that stated that an independent contractor's exemption certificate was conclusive to the contractor's status. In that decision, Justice James Nelson wrote for the majority that the claimant appropriately referred to his employee status, despite

³⁰See the final report for SB 270 at <http://erd.dli.state.mt.us/sb270/sb270.asp>.

being hired as an independent contractor, using the definition of "a duck" looking, walking, and quacking like a duck. Even if the claimant held a piece paper saying he was an independent contractor, he was still an employee—just like the duck would still be a duck, in Justice Nelson's words, "even if it is holding a piece of paper that says it is a chicken".³¹

SB 304 Study — This study to determine the State Fund's role and whether to sell all or part of the State Fund and create an assigned risk pool involved a committee of four legislators, a representative of the Governor's Office, an employer who is also on the State Fund Board of Directors, representatives of Plan 1 and Plan 2 insurers, and a representative of the State Auditor's Office. The SB 304 Committee decided against recommending sale of the State Fund and creating an assigned risk pool. At an August 20, 2004, meeting, the SB 304 Committee also decided to have the state retain control over the Old Fund. For further details see the SB 304 final report.³²

At the September 7, 2004, EAIC meeting, Senator Royal Johnson who chaired the SB 304 Committee, provided a summary report on the group's activities³³ and the following recommendations for legislation:

- Inclusion on the State Fund Board as ex-officio liaisons two members of the House of Representatives and two members of the Senate.
- A phased-in tax on State Fund premiums, which would start at 1% in FY 2006 and climb to the rate that private insurance companies now pay, 2.75%, in FY 2008.

³¹Wild v. Fregein Construction and Montana State Compensation Insurance Fund, 2003 MT 115, 315 Mont. 425, 68 P.3d 855 (2003).

³²See *SB 304 Committee Report* at <http://www.sb304.com>.

³³SB 304 Committee members were: Tom Beck, chief policy advisor in the Governor's Office; Representative Bob Bergren; David Hunter of the State Auditor's Office; Senator Royal Johnson; Jacqueline Lenmark of the American Insurance Association; Representative Dave Lewis; Senator Bea McCarthy; Jack Morgenstern, a member of the Montana State Fund Board of Directors; and George Wood of the Montana Self-Insurers Association. The summary report is Exhibit No. 1 at the EAIC's September 7, 2004, meeting.

- Permission for the State Fund to bid on third-party administrator services to public corporations.

The SB 304 group also asked for a review by the Department of Administration of the facility lease between the Department and the State Fund.

8. Summary and Conclusions

Workers' compensation issues are complex and cumbersome, as perhaps only a system designed to address many types of benefits and concerns can be. By seeking to minimize costs to employers and employees, the Legislature has put into place a system that few see as perfect but most see as workable. Yet the Legislature also has decided to allow exemptions or exclusions for certain groups of people from the state's Workers' Compensation Act and the Occupational Disease Act. No one is entirely certain whether the exemptions and exclusions result in the remedy of lawsuits or in greater costs to society (than costs for coverage). In the first case, statistics are not kept on such lawsuits.³⁴ In the second case, exempt workers might go untreated until their medical condition becomes more complicated or they might become jobless or less than fully employed. Statistics relating to these types of conditions or circumstances also are not gathered.

As the EAIC reviewed the three components of the SJR 17 workplan—simplification and clarification of general statutes; exemptions; and codification of court cases affecting occupational disease—the members saw that their

By seeking to minimize costs to employers and employees, the Legislature has put into place a system that few see as perfect but most see as workable.

efforts would not necessarily resolve the complexity of the system. For issues on which the ad hoc working group could reach agreement, the EAIC accepted recommendations for change. Where the people who deal with workers' compensation issues on a daily basis could not come to agreement, particularly with

³⁴Committee staff asked trial attorneys who deal with workers' compensation cases if they knew of workers who either were unserved or who sued under tort liability laws. Only one attorney, Sydney McKenna, responded. She noted that the exclusion of mental or stress-related damages from the workers' compensation and occupational disease statutes has meant that law enforcement officers and other first responders have had to sue their employers to obtain assistance if traumatic incidents result in their inability to continue working. See Appendix F.

respect to exemptions made in past legislative sessions in response to constituent requests, the EAIC duly noted the difficulties and decided not to call for changes. Even though the ad hoc working group could not reach agreement on how to address the Montana Supreme Court's decisions on occupational disease, the EAIC moved forward with a bill draft as a way, in part, of encouraging action.

The EAIC recommended the following bill drafts as committee bills:

- two workers' compensation clarification and simplification bill drafts, LC 188 and LC 189.
- LC 358, recommended by the SB 270 Study Committee on independent contractors, which sets forth newly defined measures for determining independent contractor status as well as an education program to inform employers and independent contractors that a person hired as an independent contractor cannot be treated as an employee.
- LC 353, incorporating the rulings of the Montana Supreme Court into the Occupational Disease Act of Montana by eliminating provisions that treated claimants under this Act differently from claimants under the Workers' Compensation Act.

Appendix A

SENATE JOINT RESOLUTION NO. 17

INTRODUCED BY TESTER

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE OR DIRECT SUFFICIENT STAFF RESOURCES TO STUDY METHODS OF SIMPLIFYING LAWS RELATED TO WORKERS' COMPENSATION AND OCCUPATIONAL DISEASES.

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE OR DIRECT SUFFICIENT STAFF RESOURCES TO STUDY METHODS OF SIMPLIFYING LAWS RELATED TO WORKERS' COMPENSATION AND OCCUPATIONAL DISEASES.

WHEREAS, Montana's workers' compensation laws were first enacted in 1915 and have been amended in virtually every legislative session since that time; and

WHEREAS, the significant impact on Montana's economy from workers' compensation premiums and benefits often overshadows the economic costs of understanding arcane provisions of a patchwork of workers' compensation laws; and

WHEREAS, the Montana Legislature has the ability to simplify and clarify regulations by directing a study committee to review, in conjunction with administrative rules, all of the provisions related to administration of the Workers' Compensation Act and the Occupational Disease Act of Montana, excluding benefits; and

WHEREAS, the Montana Legislature believes that the traditional workers' compensation system of compensating injured workers without regard to fault should continue into the future; and

WHEREAS, terms and concepts, such as which employers, employees, and independent contractors are covered by the workers' compensation laws, have become confusing in current statutes; and

WHEREAS, the list of exempted employments of current law may be discriminatory and may undermine a public policy that calls for all employment to be covered by the principles of workers' compensation coverage; and

WHEREAS, Montana employers and employees deserve to have workers' compensation laws that are clear, concise, and understandable.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee, pursuant to section 5-5-217, MCA, or direct sufficient staff resources to examine the workers' compensation laws and related administrative rules of the State of Montana and provide any suggested changes for laws to clarify the language and intent for all who are governed by workers' compensation laws of this state.

BE IT FURTHER RESOLVED, that, if the study is assigned to staff, any findings or conclusions be presented to and reviewed by an appropriate committee designated by the Legislative Council.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review requirements, be concluded prior to September 15, 2004.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 59th Legislature.

- END -

Appendix B

Exemptions to Employee Definition, 39-71-118(2), MCA, and Comparisons with Other States

This table is based on the <i>Montana Code Annotated Annotations 2004</i> , Minutes for House and Senate hearings on relevant bills when available, and information from the U.S. Chamber of Commerce <i>2003 Analysis of Workers' Compensation Laws</i> , which provides a look at whether other states handle similar exemptions. The cross-state comparison relies on the report's shorthand information and does not directly analyze each state's workers' compensation law. Please note: (1) The table should be used only for general comparison. (2) Exemptions (the far left column) are those listed in 39-71-118(2), MCA.		
Exemption	Background Information	States (includes D.C.)
(a) a person who is participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount, or otherwise, a pass, ticket, permit, device, or other emolument of employment	1993, Ch. 154, HB 259 Introduced by Rep. Dore Schwinden, parts (a) and (b). Case Notes: The Montana Supreme Court said a ski instructor who was injured on a warmup run prior to teaching a lesson was performing a prescribed duty of employment. The recreational activity exclusion was not applicable, and the injury occurred during the course and scope of employment, making the injury a compensable industrial accident. <i>Connery v. Liberty NW. Ins. Corp.</i> , 280 M 115, 929 P2d 222, 53 St. Rep. 1324 (1996).	CA Employers not liable for off-duty recreational, social, athletic activity that is not part of work-related duties. Exempts volunteers at nonprofit camps; employer-sponsored bowling teams. CO Exempts volunteer ski patrol and ski instructors. NC Exempts volunteer ski patrol persons.

Exemptions to Employee Definition, 39-71-118(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(b) a person performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities	1993, Ch. 154, HB 259 Introduced by Rep. Dore Schwinden, parts (a) and (b).	<p>AZ Certain volunteers are exempt.</p> <p>FL Exempts volunteers, including volunteer firefighters (not volunteers at other government entities).</p> <p>ID Exempts volunteer ski patrollers.</p> <p>ME Exempts voluntary participants in employer-sponsored athletic events.</p> <p>NV Exemption if at employer social/sport event without pay. Volunteer ski patrol exempt.</p> <p>OR Exempts volunteer ski patrols, golf caddy trainees.</p> <p>TN Exempts volunteer ski patrols.</p>

Exemptions to Employee Definition, 39-71-118(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(c) a person who is performing services as a volunteer, except for a person who is otherwise entitled to coverage under the laws of this state. As used in this subsection, "volunteer" means a person who performs services on behalf of an employer but who does not receive wages as defined in 39-71-123, MCA.</p>	<p>1995, Ch. 424, HB 462 Introduced by Rep. David Ewer.</p> <ul style="list-style-type: none"> • Hearing in House Business/Labor 2/13 • Hearing in Senate Labor 3/02 	<p>AL Voluntary for volunteer fire departments. AK Required of med tech volunteers. CA Required for disaster services volunteers. CO Covered if locality adopts coverage. HI Exempts volunteers of religious, charitable, nonprofit organizations. IN Required for volunteers in emergency management, hazardous materials. KY Required for volunteer firefighters, other firefighters, EMS, police. LA Voluntary for volunteer firefighters. MN Required for vol. first responders, law enforcement, civil air patrol members. MO Exempts unpaid vols. of tax-exempt org. NY Exempts vols. not in law as employees. OK Exempts vols. who get meals as wages. UT Required for volunteers. WA Exempts volunteer law enforcement and unpaid workers in charity organizations. WV Exempts 1st responder/gov't volunteers. WY Certain volunteers must be covered.</p>

Exemptions to Employee Definition, 39-71-118(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(d) a person serving as a foster parent, licensed as a foster care provider in accordance with 52-2-621, and providing care without wage compensation to no more than six foster children in the provider's own residence. The person may receive reimbursement for providing room and board, obtaining training, respite care, leisure and recreational activities, and providing for other needs and activities arising in the provision of in-home foster care.</p>	<p>1997, Ch. 515, HB 146</p> <p>Introduced by Rep. Royal Johnson.</p> <p>Initiated to protect foster parents, since they might be classified as employees but IRS does not consider them as employees.</p> <ul style="list-style-type: none"> Hearing in House Human Services 1/15 <p><u>Proponents:</u> Hank Hudson and Karlene Leonard, DPHHS</p> <p><u>Opponents:</u> Don Judge, AFL-CIO; Kate Cholewa, MT Women's Lobby; Russell LaVigne, Peoples' Law Center; Nancy Butler, State Fund.</p> <p><u>Informational:</u> Dennis Zieler, Unemployment Ins., and George Wood, MT Self-Insurers' Assn.</p> <ul style="list-style-type: none"> Senate Public Health Hearing 3/21 <p><u>Proponents:</u> Hank Hudson, DPHHS; Laurence Hubbard, State Conservation Insurance Fund; Jacqueline Lenmark, American Insurance Assn., Mark Barrett, writer</p> <p><u>Opponents:</u> None</p>	<p>Nothing similar</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

This table is based on the *Montana Code Annotated Annotations 2004*, Minutes for House and Senate hearings on relevant bills when available, and information from the U.S. Chamber of Commerce's *2003 Analysis of Workers' Compensation Laws*, which gives a rough idea of whether other states have similar exemptions. The comparison relies on the shorthand information in the *Analysis* and is not a direct review of each state's workers' compensation law. As such, the table should be used only for general comparison. Please note:

(1) Twelve states base the requirement for workers' compensation on the number of employees. Thresholds range from one to five employees. The category "Exemption Variations" or "Exempt var." includes these states if an occupation is likely to have few employees per firm and thus be exempt. Also, Wyoming, North Dakota, and Illinois, which require workers' compensation only for hazardous or "extra-hazardous" employment, and Hawaii, which requires only industrial employees to be covered, often are included in Exemption Variations.

(2) Exemptions (the far left column) are those listed in 39-71-401(2), MCA:

- (a) household, domestic employment;
- (b) casual employment;
- (c) employment of dependent member of an employer's family under certain conditions;
- (d) generally employment of sole proprietors, working members of a partnership, a limited liability partnership or a member-managed LLC;
- (e) employment of a real estate, securities, or insurance salesperson paid solely by commission, without guaranteed minimum earnings;
- (f) employment as a direct seller;
- (g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the U.S.;
- (h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;
- (i) employment with a railroad engaged in interstate commerce, except for railroad construction work;
- (j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;
- (k) employment of a person performing services as a newspaper carrier or freelance correspondent;
- (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e);
- (m) a person employed by an enrolled tribal member or an entity at least 51% owned by an enrolled tribal member or members;
- (n) employment of a jockey under certain conditions;
- (o) employment of a trainer, assistant trainer, exercise person, or pony person under certain conditions;
- (p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer;
- (q) a person who performs services as a petroleum land professional;
- (r) an officer of a quasi-public or a private corporation or manager of a manager-managed LLC under certain conditions;
- (s) a person who is an officer or a manager of a ditch company defined in 27-1-731;
- (t) service performed by an ordained, commissioned, or licensed minister of a church under certain conditions;
- (u) service performed to provide companionship service or respite care under certain conditions; and
- (v) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10).

(3) Montana is included in the list of states, as is the District of Columbia. Thus, the column on the far right generally will total 51.

(4) Since the focus is Montana exemptions, Montana always will be among the states that exempt an occupation. Texas generally will be represented because Texas is the only state that allows employers to choose whether to provide workers' compensation coverage.

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(a) household, domestic employment	<p>1915, Ch. 96, SB 157</p> <p>Introduced by Joint Committee on Compensation as substitute for HB 136 and SB 74. Original law also exempted "farm or other laborers, engaged in agricultural pursuits, or persons whose employment is of a casual nature."</p> <p>1987, Ch. 464, SB 315</p> <p>Sponsor: Sen. Bob Williams, at request of Governor.</p> <p>As part of major reforms, farm and ranch laborers were amended out. Proponents and opponents were to entire bill.</p> <p><u>Proponents:</u> Bob Robinson, administrator of Workers' Compensation Division; Sen. Gene Thayer; Dave Patterson of UM Law School; Rep. Paula Darko; Bruce Vincent of WCAC in Libby; Dawn DeWolf, the MT Assn. for Rehabilitation and the MT Assn for Rehabilitation Facilities; Doug Crandell, Brand S Lumber and chair of the MT Wood Products Assn.; Dr. Jack McMahon, the MT Medical Assn.; Mike McCone, the Western Environmental Trade Assn.; Michael Amstadter of Rehabilitation of MT; Bill Leary, past president of the MT Hospital Assn.; Chad Smith, the MT Medical Assn.; Steward Doggett, the MT Chamber of Commerce; Alec Hansen, the MT Municipal Insurance Authority; Bonny Tippy, the MT Chiropractor Assn.; attorney Norm Grosfield; George Wood, the MT Self-Insurers' Assn.; Robert Holding of the MT Motor Carriers Assn.; Mons Tiegen, the MT Stockgrowers and MT Cattlemens Assn.; Steve Seiffert, Columbia Falls Aluminum Co.; Irv Dillingier, the MT Homebuilders Assn. and the MT Building Material Dealers Assn.; and Keith Olson of the MT Logging Assn.</p> <p><u>Opponents:</u> attorney Terry Triewiler; attorney Ben Everett; Jim Murry, MT State AFL-CIO; Jay Reardon of Local 72 of the United Steelworkers of Am.; injured worker Willis Bickle; Gene Fenderson, the MT State Building Construction Trade Union; attorney Joe Bottomly; and Rep. Jerry Driscoll.</p>	<p>Domestics exempt: 24</p> <p>Hrs/household variations: 20</p> <p>Not covered: 7</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(b) casual employment (defined in 39-71-116(7) as "employment not in the usual course of the trade, business, profession, or occupation of the employer")	<p>1915, Ch. 96, SB 157, see subsection (a) for history.</p> <p>1973, Ch. 492, SB 124, put under its own subsection.</p> <p>1985, Ch. 336, HB 421</p> <p>Sponsor: Rep. Ray Brandewie, by request of Dept. of Commerce</p> <p>There was an exclusion of volunteers under 67-2-105 both in 39-71-401(2)(b) and 39-71-401(2)(f).</p>	<p>Exempt¹: 26</p> <p>Variations: 10</p> <p>Not specified¹: 15</p>
(c) employment of dependent member of an employer's family if exemption may be claimed by employer under Internal Revenue code	<p>1973, Ch. 492, SB 124, if dependent "dwelling in his household"</p> <p>1989, Ch. 33, HB 21</p> <p>Sponsor: Rep. Bob Marks</p> <p>Altered to allow exemptions if dependent can be claimed under IRS for income tax purposes. Response to Cottrill v. State Comp Insur. Fund, 44 St. Rep 1762 (1987).</p>	<p>Exempt: 14</p> <p>Exemption tied to staff limits: 10</p> <p>Not specified: 27</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(d) employment of sole proprietors, working members of a partnership, working members of a LLP, working members of a member-managed LLC, except as provided in subsection (3) (NOTE: subsection (3) refers to independent contractors)	<p>1983, Ch. 470, HB 277 Sponsor: Rep. Clyde Smith Exempted certain independent contractors.</p> <p>1987, Ch. 464, SB 315 Sponsor: Sen. Bob Williams, by request of Governor Added "except as provided in subsection (3)". See proponents and opponents under subsection (a).</p> <p>1995, Ch. 516, HB 200 Sponsor: Rep. Ellen Bergman, by request of Dept. of Labor & Industry Added "working members of a member-managed limited liability company" as a clarification. Bill emphasized independent contractors and subcontractors. <u>Proponents:</u> Chuck Hunter, Dept. of Labor & Industry; George Wood, Montana Self-Insurers' Assn.; Carl Schweitzer, Montana Contractors' Assn.; Jacqueline Lenmark, American Insurance Assn.; Chris Racicot, Montana Building Industry Assn.; Laurence Hubbard and Nancy Butler, State Fund; Don Allen, Coalition for Workers' Compensation Improvement. <u>Opponents:</u> None Additional Witnesses: Steve Shapiro, MT Nurses Assn., and Russ Cater, Dept. of Social & Rehabilitation Services, each offered amendments. Neither was adopted.</p> <p>1997, Ch. 172, SB 41 Sponsor: Sen. Steve Benedict Added "working members of a limited liability partnership". Sponsor said bill streamlines process, removes "underinsured fund", and added "working members" of a LLP. Testimony focused on underinsured fund and issue of it not working.</p>	<p>Sole proprietors Exempt¹: 43 Not specified²: 5 Exempt var.: 3</p> <p>Partners Exempt: 38 Not specified: 5 Exempt var.: 8</p> <p>Member-managed LLC Exempt: 5 Not specified: 35 Exempt var.³: 11</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings	<p>1987, Ch. 464, SB 315</p> <p>Sponsor: Sen. Bob Williams, by request of Governor</p> <p>As part of broad revisions, included broker or salesperson licensed under Board of Realty Regulation.</p> <p>See proponents and opponents under subsection (a).</p> <p>2001, Ch. 339, SB 450</p> <p>Sponsor: Sen. Duane Grimes</p> <p>Bill expanded coverage to include securities, insurance salespersons.</p> <p><u>Proponents:</u> Greg Van Horsen for State Farm; John Metropolous for Farmers Insurance; Joe Mazurek for D.A. Davidson</p> <p><u>Opponents:</u> None</p>	<p>Real estate:</p> <p>Exempt: 29</p> <p>Not Specified⁴: 21</p> <p>Exempt var: 1(la)</p> <p>Securities: Exempt: 2</p> <p>Not Specified: 40</p> <p>Insur/Cmsn:</p> <p>Exempt: 4</p> <p>Not Specified: 39</p> <p>Brokers/Sellers --</p> <p>Cmsn Exempt⁴: 12</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(f) employment as a direct seller as defined by 26 U.S.C. 3508	<p>1985, Ch. 94, HB 213 Sponsor: Rep. Jan Brown</p> <p>Inserted direct seller language, originally as 39-71-401(2)(d) in section with ranch hands, brokers and salespersons, and also in first sentence of 39-71-401(3).</p> <p>1987, Ch. 464, SB 315 Sponsor: Sen. Bob Williams, by request of Governor</p> <p>As part of broad revisions referenced "primarily in the customer's home"</p> <p>See proponents and opponents under subsection (a).</p> <p>1993, Ch. 555, HB 287 Sponsor: Sen. William Wiseman</p> <p>General revision of statutes</p> <p>(Bill history shows hearings on days when Minutes do not reflect hearing.)</p> <p>1995, Ch. 48, HB 98 Sponsor: Rep. Bob Pavlovich</p> <p>Included "as defined" in federal law.</p> <p><u>Proponents</u>: Dave Brown of Butte; Eric Ellman for Direct Selling Assn.; Richard Herthneck for Kirby; Brad Griffens for MT Retail Assn.; attorney David Rott; Blaine Schaff; Kirby distributors Mike Davis, Bob Gustafson and Dan Fouts. Written testimony: sellers of Mary Kay & Amway products.</p> <p><u>Opponents</u>: None</p>	<p>Exempt: 3</p> <p>Exempt on #s⁵: 12</p> <p>Not Specified: 26</p> <p>Brokers/Sellers --</p> <p>Cmsn Exempt⁴: 12</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the U.S.	1973, Ch. 492, SB 124 Sponsor: Sen. George Siderius Original statute revised to provide new subsections in 92-202.1.	Similar language: 6 Interstate commerce ref ⁶ : 12 Not specified: 33
(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105	1985, Ch. 336, HB 421 Sponsor: Rep. Ray Brandewie by request of Dept of Commerce Exception added.	Exempt: 4 Exempt var ⁷ : 15 Not specified: 22
(i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter	1915, Ch. 96, SB 157 House Journal for Majority Report states: "At the request of the railway employees and with the approval of the representatives of railroads, we have substituted for Section 17(e) the following: "Section 17(e) The provisions of this Act shall not apply to any railroads engaged in interstate commerce except that railroad construction work shall be included in the subject to the provisions of this Act". "	Exempt: 11 Common carriers/ fed law exempt: 5 Not specified: 35

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event	<p>1985, Ch. 100, HB 715 Sponsor -- Rep. Gary Spaeth Excluded certain officials at school events</p> <p>2001, Ch. 43, HB 19 Sponsor -- Rep. R. Lenhart Specified referee, umpire, or judge, at an amateur athletic event and removed "unless otherwise employed by a school district".</p> <p><u>Proponents:</u> Tom Clement, Helena Babe Ruth; Rick Harbin, Colstrip Park District; Sen. Bob DePratu, Whitefish; Bob Worthington, MOA member; John Williams, Colstrip Park Dist Board. Clement said cost of work comp would be \$5,000-\$7,000 yr. Officials have liability insurance coverage Harbin: school officials already covered.</p> <p><u>Opponents:</u> None</p>	<p>Similar groups exempt: 6 Exempt var.: 8 Not specified: 37</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "freelance correspondent" is a person who submits articles or photographs for publications and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier": (i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles; but</p> <p>(ii) does not include an employee of the paper who incidentally to the employee's main duties, carries or delivers papers.</p>	<p>1987, Ch. 148, HB 80 Sponsor: Rep. Jan Brown</p> <p>Partially stems from 1983 court case in which a newspaper carrier's girlfriend was injured while helping the carrier deliver papers. The girlfriend claimed workers' compensation. Both the carrier and his employer, the <i>Billings Gazette</i>, disagreed that she was an employee. The court said she was.</p> <p><u>Proponents</u>: Les Loble for Lee Enterprises, with Lee paper support from the <i>Billings Gazette</i>, <i>Montana Standard</i>, <i>Missoulian</i>, <i>Independent Record</i>; Bruce Smith of <i>Bozeman Daily Chronicle</i>; Dave Byerly, <i>Lewistown News Argus</i>; Steve Studt, <i>Great Falls Tribune</i>; George Moore, MT Press Assn.</p> <p><u>Opponents</u>: Hiram Shaw, Workers' Compensation Division; Jim Murry, AFL-CIO</p>	<p>1 + Exempt⁸: 8</p> <p>Not specified: 42</p> <p>Specific coverage: 1 (Ky)</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e)	<p>1987, Ch. 526, HB 381 Sponsor: Rep. Ed Grady Added cosmetologists and barbers to independent contractor section, 39-71-401(3). <u>Proponents:</u> Gary Burton, cosmetologist; Gayle Graber, cosmetologist; Darlene Matiola, president of Montana Cosmetologists Assn.; Rick Tucker, Cosmetology Assn. of Montana; Jack Romiejn, salon owner; Bob Robinson, Workers' Compensation Division. <u>Opponents:</u> None</p> <p>1991, Ch. 573, HB 807 Sponsor: Rep. Royal Johnson Inserted exclusion for cosmetologists and barbers under 39-71-401(2). (Bill history shows hearings on days when Minutes do not reflect hearing.)</p>	<p>Exempt: 2 Exempt var.⁷: 15 Not specified: 34</p>
(m) a person who is employed by an enrolled tribal member or an association, business, corporation or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation	<p>1993, Ch. 555, HB 287 Sponsor: Rep. William Wiseman General revision of statute (Bill history shows hearings on days when Minutes do not reflect hearing.)</p> <p>1995, Ch. 516, HB 200 Sponsor: Rep. Ellen Bergman, by request of Dept. of Labor & Industry Amid extensive revisions, expanded to include business, etc., and clarified ownership of 51% by enrolled tribal member. (See proponents and opponents listed under subsection (d).)</p>	<p>Exempt: 2 Exempt var.⁷: 15 Not specified: 34</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey.</p>	<p>1995, Ch. 142, SB 22</p> <p>Sponsor: Sen. Delwyn Gage by request of Dept. of Commerce</p> <p>Proponents: Sam Murfitt, executive secretary of the Montana Board of Horseracing; Rep. Daniel Fuchs</p> <p><u>Opponents</u>: None</p>	<p>Exempt: 3</p> <p>Exempt var.⁷: 17</p> <p>Not specified: 31</p>
<p>(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing services under a license issued by the board of horseracing while on the grounds of a licensed race meet</p>	<p>2001, Ch. 14, HB 26</p> <p>Sponsor, Rep. E. Clark, said HB 26 exempts people who see themselves as self-employed in horseracing.</p> <p><u>Proponents</u>: at House or Senate hearing: Sam Murfitt, Exec. Secretary Montana Board of Horseracing; Dept. of Commerce; Nancy Butler, State Fund; Jerry Keck, Administrator, Employment Relations Div., Dept. of Labor & Industry; Mike Ottman, race horse owner; Buster Brown, Shelby Fair Board</p> <p><u>Opponents</u>: None</p>	<p>Exempt: 2</p> <p>Exempt var.⁷: 15</p> <p>Not specified: 31</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703	<p>1995, Ch. 112, HB 216</p> <p>Sponsor: Rep. Vicki Cocchiarella</p> <p>Spouse originally perceived as "dependent", who would have been exempt under 39-71-401(2)(c). Rep. Cocchiarella cited one case in which an audit found that a custodial service employer should have paid workers' compensation when his wife substituted for a sick employee. The bill clarified that a spouse is exempt.</p> <p><u>Proponents:</u> Riley Johnson, National Federation of Independent Businesses</p> <p><u>Opponents:</u> None</p>	<p>Exempt: 7</p> <p>Exempt var.: 15</p> <p>Not specified: 29</p>
<p>(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is a person who:</p> <p>(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;</p> <p>(ii) is paid for services that are directly related to the completion of a contracted specific task rather than on an hourly wage basis; and</p> <p>(iii) performs all services as an independent contractor pursuant to a written contract</p>	<p>1995, Ch. 95, SB 125</p> <p>Sponsor: Sen. Tom Keating.</p> <p>The stated purpose of bill as heard in Senate Labor and Industry Committee was "to define the law to identify what a petroleum land professional is; to determine they are independent contractors; they have written agreements with the client for their contractual work; and they are not employees." (Minutes 1/19/95) Sponsor said original bill language was taken from New Mexico, Texas, and Colorado statutes.</p> <p>National Petroleum Assn. supplied information.</p> <p><u>Proponents:</u> Gail Abercrombie, Montana Petroleum Association</p> <p><u>Opponents:</u> None</p> <p><u>Interested Party:</u> Mary Allen, CWCSI</p>	<p>Exempt: 2</p> <p>Exempt var.: 16</p> <p>Not specified: 33</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(r) an officer of a quasi-public or a private corporation or manager of a manager-managed LLC who qualified under one or more of the following provisions:</p> <p>(i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the LLC and does not receive any pay from the corporation or the LLC for performance of the duties;</p> <p>(ii) the officer or manager is engaged primarily in household employment for the corporation or the LLC;</p> <p>(iii) the officer or manager either:</p> <p>(A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the LLC; or</p> <p>(B) owns less than 20% of the number of shares of stock in the corporation or LLC if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or LLC; or</p> <p>(iv) the officer is the spouse, child, adopted child, stepchild, mother, father, son-in-law, daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection (2)(r)(iii)(A) or (B)</p>	<p>1995, Ch. 516, HB 200</p> <p>Sponsor: Rep. Ellen Bergman by request of Dept. of Labor & Industry</p> <p>Amid extensive revisions, HB 200 included officer of a quasi-public or private corporation or manager of a manager-managed limited liability company who qualified under various provisions</p> <p>1997, Ch. 172, SB 41</p> <p>Sponsor: Sen. Steve Benedict</p> <p>SB 41 inserted "not" after "manager is".</p> <p>Sponsor said bill streamlines process, removes "underinsured fund", and updates to improve LLP, approved in 1995.</p> <p>Testimony focused on underinsured fund and issue of it not working.</p> <p>Proponents: Chuck Hunter, Dept. of Labor & Industry; Nancy Butler, State Fund; George Wood, MT Self-Insurers' Assn.</p> <p>Opponents: None</p> <p>1997, Ch. 386, SB 304</p> <p>Sponsor: Sen. Mack Cole</p> <p>SB 304 inserted clarifications in (iii) (B).</p> <p>(Bill history shows hearings on days when Minutes do not reflect hearing.)</p>	<p>Exempt: 7</p> <p>Exempt var.⁹: 11</p> <p>Not specified or not exempt: 33</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
(s) a person who is an officer or a manager of a ditch company defined in 27-1-731	1997, Ch. 386, SB 304 Sponsor: Sen. Mack Cole (Bill history shows hearings on days when Minutes do not reflect hearing.)	Exempt: 2 Exempt var.: 7 Not specified: 42
(t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order	1997, Ch. 491, HB 561 Sponsor: Rep. Betty Lou Kasten Part of a broad bill that included: harmonization of definitions among Titles and harmonization of administrative functions, including a move of unemployment functions to Dept. of Revenue. <u>Proponents:</u> (reflected support for administrative changes) Mary Bryson, director, and Jeff Miller, Dept. of Revenue; Pat Haffey and Dennis Zeiler, Dept. of Labor & Industry; Tom Harrison, Montana CPAs; David Owen, MT Chamber of Commerce; Riley Johnson, NFIB; Bob Gilbert, Job Servers Employment Council; Nancy Butler, State Fund; Eric Ellman, Direct Trade Assn. (there for a direct seller amendment); Erin Rowe-Graves, Amway (also supporting amendment); Brad Griffin, MT Retail Assn. (also supporting amendment). <u>Opponents:</u> None One question about affect on UI exemptions for church employees. Response from DOLI was: very few people affected, small impact in revenue.	Exempt: 6 Exempt var.: 7 Not specified: 38

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian</p>	<p>2003, Ch. 83, HB 150</p> <p>Sponsor: Rep. Bob Lawson</p> <p><u>Proponents:</u> Jerry Driscoll, MT State AFL-CIO; Louella Hahmans, Baker resident; Joan Kimble, Yellowstone County Counsel on Aging, Billings; Don Judge, Teamsters 190; Susan Smith-Havener, Billings; Joan Gromin, development administrator, STEP; Val Piercy, Florence resident; Sylvia Danforth, director, Developmental Educational Assistance Program (DEAP); Wally Meleher, Janie McCall, administrator, MT Children's Initiative and MT Assn. of Independent Disabilities Services; Chris Volinkaty, Children's DD Services and exec. dir. Child Development Center; Jan Spiegler-Stinger, MT Families with Children with Disabilities; Steve Yeakel, MT Council for Maternal and Child Health.</p> <p><u>Opponents:</u> None</p> <p><u>Informational Testimony:</u> John Andrew, Dept. of Labor & Industry; Jannis Conselyea, Bureau Chief, Developmental Disabilities Program Support</p>	<p>Exempt: 4</p> <p>Exempt var.: 25</p> <p>Not specified: 22</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>(v) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10)</p> <p>NOTE: 39-71-118(10) says:</p> <p>(10) For purposes of this section, an "employee or worker in this state" means:</p> <p>(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;</p> <p>(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;</p> <p>(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or</p> <p>(d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:</p> <p>(i) nonresident employees are hired in Montana;</p> <p>(ii) nonresident employees' wages are paid in Montana;</p> <p>(iii) nonresident employees are supervised in Montana; and</p> <p>(iv) business records are maintained in Montana</p>	<p>2003, Ch. 193, SB 108</p> <p>Sponsor: Sen. Walter McNutt termed SB108 a housekeeping bill.</p> <p>Proponents: Kevin Braun and Jerry Keck, Dept. of Labor & Industry; Matthew Cohn and Nancy Butler, Montana State Fund; Aiden Myhre, MT Chamber of Commerce; Jacqueline Lenmark, American Insurance Assn.; George Wood, Montana Self-Insurers' Assn.; Larry Jones, Liberty Mutual Insurance.</p> <p>Opponents: None</p> <p>Addressed Montana Supreme Court decision involving an out-of-state trucker in Schimmel v. Uninsured Employers' Fund, 2001 MT 280, 307 M 344, 38 P3d 788 (2001).</p>	<p>Exempt: 1</p> <p>Exempt var.: 7</p> <p>Not specified: 43</p>

Exemptions in 39-71-401(2), MCA, and Comparisons with Other States

Exemption	Background Information	States (includes D.C.)
<p>¹ "Exempt" in most cases also means elective. "Not specified" means the industry may have workers' compensation coverage.</p> <p>² "Not specified" may mean coverage is required for companies of x number of employees and not required if fewer employees, but the type of company is not specified.</p> <p>³ Outside of Montana, exemption variations for (d), relating to sole proprietors, partnerships and limited-liability member-managed companies may have some overlap with (r), which involves manager-managed LLCs, depending on how the U.S. Chamber of Commerce summarized each state's laws for LLCs.</p> <p>⁴ The numbers do not add to 51 because some states list "brokers" with real estate licensees and other states list "brokers" separately. Since it is not clear if securities and insurance "brokers" are included, these categories are marked as "not specified" in some cases (since insurance and securities are not specifically mentioned even if "brokers" are mentioned). However, some may be marked as exempting "brokers"-- amounting to double-counting for those states for whom "brokers" are listed but that do not specify what type of brokers.</p> <p>⁵ "Exempt on #s" means when employment is less than a specified number of staff the employer is exempt. Direct seller and other categories, e.g. barber/cosmetologist, may or may not fit this exemption but are listed as being exempt.</p> <p>⁶ Interstate commerce includes railroads, although there is a separate category in Montana law for railroad workers.</p> <p>⁷ "Variation" includes an exemption because state laws allow exemptions for fewer than "x" employees, which is likely in this case.</p> <p>⁸ One or more of the listed group is exempt.</p> <p>⁹ Maine requires coverage for quasi-municipal corporations. North Carolina requires coverage for quasi-public corporations but other corporate officers may reject.</p>		

Appendix C

SENATE BILL NO. 8 (LC 188)

INTRODUCED BY G. ROUSH

BY REQUEST OF THE ECONOMIC AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT SIMPLIFYING AND CLARIFYING TERMINOLOGY AND PROCEDURES IN THE WORKERS' COMPENSATION ACT; SPECIFYING THAT STATUTORY AND COMMON-LAW RULES OF EVIDENCE ARE NOT APPLICABLE AT DEPARTMENT OF LABOR AND INDUSTRY HEARINGS UNDER THE WORKERS' COMPENSATION ACT; CLARIFYING WITH WHOM AND BY WHOM REPORTS OF ACCIDENTS, INJURIES, AND OCCUPATIONAL DISEASE ARE TO BE FILED; PROVIDING THE DEPARTMENT OF LABOR AND INDUSTRY WITH RULEMAKING AUTHORITY FOR REPORTING REQUIREMENTS FOR INJURY OR OCCUPATIONAL DISEASE; CLARIFYING WHICH INSURER PAYS BENEFITS WHEN THERE IS A DISPUTE BETWEEN MULTIPLE INSURERS; CLARIFYING HOW LUMP-SUM PAYMENTS ARE ADDRESSED; REPEALING STATUTES ON PAYROLL COMPUTATION AND WAGE DEFINITIONS COVERED BY OTHER STATUTES; REMOVING THE REQUIREMENT FOR ASSESSMENTS ON CERTAIN PUBLIC CORPORATIONS THAT FAIL TO FILE PAYROLL REPORTS; AMENDING SECTIONS 39-71-105, 39-71-107, 39-71-201, 39-71-204, 39-71-307, 39-71-407, 39-71-608, 39-71-703, 39-71-741, AND 39-71-1006, MCA; REPEALING SECTIONS 39-71-302, 39-71-303, 39-71-308, AND 39-71-318, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-105, MCA, is amended to read:

"39-71-105. **Declaration of public policy.** For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:

(1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, ~~wage-supplement~~ wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

(3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

(4) Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party.

(5) It is the intent of the legislature that stress claims, often referred to as "mental-mental claims" and "mental-physical claims", are not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have

a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, ~~as is the case with repetitive-injury claims~~, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system."

Section 2. Section 39-71-107, MCA, is amended to read:

"39-71-107. Insurers to act promptly on claims -- in-state adjusters. (1) Pursuant to the public policy stated in 39-71-105, prompt claims handling practices are necessary to provide appropriate service to injured workers, to employers, and to providers who are the customers of the workers' compensation system.

(2) All workers' compensation and occupational disease claims filed pursuant to the Workers' Compensation Act and the Occupational Disease Act of Montana must be adjusted by a person in Montana. For a claim to be considered as adjusted by a person in Montana, the person adjusting the claim is required to determine the entitlement to benefits, authorize payment of all benefits due, manage the claim, have authority to settle the claim, maintain an office located in Montana, and adjust Montana claims from that office. Use of a mailbox or maildrop in Montana does not constitute maintaining an office in Montana.

(3) An insurer shall maintain the documents related to each claim filed with the insurer under the Workers' Compensation Act and the Occupational Disease Act of Montana at the Montana office of the person adjusting the claim in Montana until the claim is settled. The documents may be either original documents or duplicates of the original documents and must be maintained in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant or the department. Settled claim files stored outside

of the adjuster's office must be made available within 48 hours of a request for the file. Electronic or optically imaged documents are permitted.

(4) An insurer shall provide to the claimant:

(a) a written statement of the reasons that a claim is being denied at the time of denial;

(b) whenever benefits requested by a claimant are denied, a written explanation of how the claimant may appeal an insurer's decision; and

(c) a written explanation of the amount of wage loss benefits being paid to the claimant, along with an explanation of the calculation used to compute those benefits. The explanation must be sent within 7 days of the initial payment of the benefit.

(5) An insurer shall:

(a) begin making payments that are due on a claim within 14 days of acceptance of the claim, unless the insurer promptly notifies the claimant that the insurer needs additional information in order to begin paying benefits and specifies the information needed; and

(b) pay settlements within 30 days of the date the department issues an order approving the settlement.

~~(c) An insurer may not make payments pursuant to 39-71-608 or any other reservation of rights for more than 90 days without:~~

~~(a) written consent of the claimant, or~~

~~(b) approval of the department.~~

~~(7)(6)~~ The department may adopt rules to implement this section.

~~(7)(7)~~ For purposes of this section, "settled claim" means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full. The term does not include a claim in which there has been only a lump-sum advance of benefits."

Section 3. Section 39-71-201, MCA, is amended to read:

"39-71-201. Administration fund. (1) A workers' compensation administration fund is established out of which all costs of administering the Workers' Compensation and Occupational Disease Acts and the statutory occupational safety acts the department is required to administer, with the exception of the subsequent injury fund, as provided for in 39-71-907, and the uninsured employers' fund, are to be paid upon lawful appropriation. The department shall collect and deposit in the state treasury to the credit of the workers' compensation administration fund:

(a) all fees and penalties provided in 39-71-205, 39-71-223, 39-71-304, 39-71-307, ~~39-71-308~~, 39-71-315, 39-71-316, 39-71-401(6), 39-71-2204, 39-71-2205, and 39-71-2337; and

(b) all fees paid by an assessment of 3% of paid losses, plus administrative fines and interest provided by this section.

(2) For the purposes of this section, paid losses include the following benefits paid during the preceding calendar year for injuries covered by the Workers' Compensation Act and the Occupational Disease Act of Montana without regard to the application of any deductible whether the employer or the insurer pays the losses:

(a) total compensation benefits paid; and

(b) except for medical benefits in excess of \$200,000 for each occurrence that are exempt from assessment, total medical benefits paid for medical treatment rendered to an injured worker, including hospital treatment and prescription drugs.

(3) Each plan No. 1 employer, plan No. 2 insurer subject to the provisions of this section, and plan No. 3, the state fund, shall file annually on March 1 in the form and containing the information required by the department a report of paid losses pursuant to subsection (2).

(4) Each employer enrolled under compensation plan No. 1, compensation plan No. 2, or compensation plan No. 3, the state fund, shall pay a proportionate share of all costs of administering and regulating the Workers' Compensation Act and the Occupational Disease

Act of Montana and the statutory occupational safety acts that the department is required to administer, with the exception of the subsequent injury fund, as provided for in 39-71-907, and the uninsured employers' fund. In addition, compensation plan No. 3, the state fund, shall pay a proportionate share of these costs based upon paid losses for claims arising before July 1, 1990.

(5) (a) Each employer enrolled under compensation plan No. 1 shall pay an assessment to fund administrative and regulatory costs. The assessment is equal to 3% of the paid losses paid in the preceding calendar year by or on behalf of the plan No. 1 employer or \$500, whichever is greater. Any entity, other than the department, that assumes the obligations of an employer enrolled under compensation plan No. 1 is considered to be the employer for the purposes of this section.

(b) An employer formerly enrolled under compensation plan No. 1 shall pay an assessment to fund administrative and regulatory costs. The assessment is equal to 3% of the paid losses paid in the preceding calendar year by or on behalf of the employer for claims arising out of the time when the employer was enrolled under compensation plan No. 1.

(c) Payment of the assessment provided for by this subsection (5) must be paid by the employer in:

(i) one installment due on July 1; or

(ii) two equal installments due on July 1 and December 31 of each year.

(d) If an employer fails to timely pay to the department the assessment under this section, the department may impose on the employer an administrative fine of \$500 plus interest on the delinquent amount at the annual interest rate of 12%. Administrative fines and interest must be deposited in the workers' compensation administration fund.

(6) (a) Compensation plan No. 3, the state fund, shall pay an assessment to fund administrative and regulatory costs attributable to claims arising before July 1, 1990. The assessment is equal to 3%

of the paid losses paid in the preceding calendar year for claims arising before July 1, 1990. As required by 39-71-2352, the state fund may not pass along to insured employers the cost of the assessment for administrative and regulatory costs that is attributable to claims arising before July 1, 1990.

(b) Payment of the assessment must be paid in:

- (i) one installment due on July 1; or
- (ii) two equal installments due on July 1 and December 31 of each year.

(c) If the state fund fails to timely pay to the department the assessment under this section, the department may impose on the state fund an administrative fine of \$500 plus interest on the delinquent amount at the annual interest rate of 12%. Administrative fines and interest must be deposited in the workers' compensation administration fund.

(7) (a) Each employer insured under compensation plan No. 2 or plan No. 3, the state fund, shall pay a premium surcharge to fund administrative and regulatory costs. The premium surcharge must be collected by each plan No. 2 insurer and by plan No. 3, the state fund, from each employer that it insures. The premium surcharge must be stated as a separate cost on an insured employer's policy or on a separate document submitted to the insured employer and must be identified as "workers' compensation regulatory assessment surcharge". The premium surcharge must be excluded from the definition of premiums for all purposes, including computation of insurance producers' commissions or premium taxes. However, an insurer may cancel a workers' compensation policy for nonpayment of the premium surcharge. When collected, assessments may not constitute an element of loss for the purpose of establishing rates for workers' compensation insurance but, for the purpose of collection, must be treated as a separate cost imposed upon insured employers.

(b) The amount to be funded by the premium surcharge is equal to 3% of the paid losses paid in the preceding calendar year by or on behalf of all plan No. 2 insurers and 3% of paid losses for claims

arising on or after July 1, 1990, for plan No. 3, the state fund, plus or minus any adjustments as provided by subsection (7)(f). The amount to be funded must be divided by the total premium paid by all employers enrolled under compensation plan No. 2 or plan No. 3 during the preceding calendar year. A single premium surcharge rate, applicable to all employers enrolled in compensation plan No. 2 or plan No. 3, must be calculated annually by the department by not later than April 30. The resulting rate, expressed as a percentage, is levied against the premium paid by each employer enrolled under compensation plan No. 2 or plan No. 3 in the next fiscal year.

(c) On or before April 30, 2001, and on each succeeding April 30, the department, in consultation with the advisory organization designated pursuant to 33-16-1023, shall notify plan No. 2 insurers and plan No. 3, the state fund, of the premium surcharge percentage to be effective for policies written or renewed annually on and after July 1 of that year.

(d) The premium surcharge must be paid whenever the employer pays a premium to the insurer. Each insurer shall collect the premium surcharge levied against every employer that it insures. Each insurer shall pay to the department all money collected as a premium surcharge within 20 days of the end of the calendar quarter in which the money was collected. If an insurer fails to timely pay to the department the premium surcharge collected under this section, the department may impose on the insurer an administrative fine of \$500 plus interest on the delinquent amount at the annual interest rate of 12%. Administrative fines and interest must be deposited in the workers' compensation administration fund.

(e) If an employer fails to remit to an insurer the total amount due for the premium and premium surcharge, the amount received by the insurer must be applied to the premium surcharge first and the remaining amount applied to the premium due.

(f) The amount actually collected as a premium surcharge in a given year must be compared to the 3% of paid losses paid in the preceding year. Any amount collected in excess of the 3% must be deducted from the amount to be collected as a premium surcharge in the following

year. The amount collected that is less than the 3% must be added to the amount to be collected as a premium surcharge in the following year.

(8) On or before ~~April 30, 2001, and on each succeeding~~ April 30 of each year, upon a determination by the department, an insurer under compensation plan No. 2 that pays benefits in the preceding calendar year but that will not collect any premium for coverage in the following fiscal year shall pay an assessment equal to 3% of paid losses paid in the preceding calendar year, subject to a minimum assessment of \$500, that is due on July 1.

(9) An employer that makes a first-time application for permission to enroll under compensation plan No. 1 shall pay an assessment of \$500 within 15 days of being granted permission by the department to enroll under compensation plan No. 1.

(10) The department shall deposit all funds received pursuant to this section in the state treasury, as provided in this section.

(11) The administration fund must be debited with expenses incurred by the department in the general administration of the provisions of this chapter, including the salaries of its members, officers, and employees and the travel expenses of the members, officers, and employees, as provided for in 2-18-501 through 2-18-503, incurred while on the business of the department either within or without the state.

(12) Disbursements from the administration money fund must be made after being approved by the department upon claim for disbursement.

(13) The department may assess and collect the workers' compensation regulatory assessment surcharge from uninsured employers, as defined in 39-71-501, that fail to properly comply with the coverage requirements of the Workers' Compensation Act and the Occupational Disease Act of Montana. Any amounts collected by the department pursuant to this subsection must be deposited in the workers' compensation administration fund."

Section 4. Section 39-71-204, MCA, is amended to read:

"39-71-204. ~~Rescission Hearings -- rules of evidence -- appeal, rescission, alteration, or amendment by department of its orders, decisions, or awards -- effect -- appeal.~~ (1) The statutory and common-law rules of evidence do not apply to a hearing before the department under this chapter. A petition for a hearing before the department must be filed within 2 years after benefits are denied.

(2) A hearing under this chapter may be conducted by telephone or by videoconference.

~~†††~~(3) The department has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any ~~such~~ order, decision, or award made by it upon good cause ~~appearing therefor~~.

~~†††~~(4) Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award has the same effect as original orders or awards.

~~†††~~(5) If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge."

Section 5. Section 39-71-307, MCA, is amended to read:

"39-71-307. Employers and insurers to file reports of accidents -- penalty. (1) Every employer and every insurer is required to file with the department employer's insurer, under rules adopted by the department, a full and complete report of every accident, injury, or occupational disease to an employee arising out of or in the course of employment and resulting in loss of life or injury to the employee. The reports must be furnished to the department in the form and detail as the department prescribes and must provide specific answers to all questions required by the department under its rules. However, if an employer is unable to answer a question, the employer shall state the reason for the employer's inability to answer.

(2) Every insurer transacting business under this chapter shall, ~~at the time and in the manner prescribed under rules adopted by the~~ department, make and file with the department the reports of ~~accidents as the department requires every injury or occupational~~ disease.

(3) An employer, ~~or insurer, or adjuster~~ who refuses or neglects to submit to the ~~department~~ reports necessary for the proper filing and review of a claim, as provided in subsection (1) or (2), shall be assessed a penalty of not less than \$200 or more than \$500 for each offense. The department shall assess and collect the penalty. An ~~employer or insurer~~ may contest a penalty assessment in a hearing conducted according to department rules."

Section 6. Section 39-71-407, MCA, is amended to read:

"39-71-407. Liability of insurers -- limitations. (1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

(2) (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

- (i) a claimed injury has occurred; or
- (ii) a claimed injury aggravated a preexisting condition.
- (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

(3) (a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

- (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas,

oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(ii) the travel is required by the employer as part of the employee's job duties.

(b) A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.

(4) An employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. However, if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection does not apply.

(5) When a compensable injury occurs and there is a liability dispute between two or more insurers, the insurer at risk to pay benefits for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer at risk to pay for the most recently filed claim is not responsible for paying benefits, that insurer may seek reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

~~†5†~~(6) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury.

~~†6†~~(7) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and

historical information concerning the relationship of the worker's condition to the original injury.

~~++~~ (8) As used in this section, "major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes."

Section 7. Section 39-71-608, MCA, is amended to read:

"39-71-608. Payments within thirty days by insurer without admission of liability or waiver of defense authorized -- notice -- limitations on payments over ninety days. (1) An insurer may, after written notice to the claimant and the department, make payment of compensation benefits within 30 days of receipt of a claim for compensation without ~~such~~ the payments being construed as an admission of liability or a waiver of any right of defense.

(2) An insurer may not make payments pursuant to this section for more than 90 days without:

(a) written consent of the claimant; or

(b) approval of the department."

Section 8. Section 39-71-703, MCA, is amended to read:

"39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is not based exclusively on complaints of pain;

(ii) is established by objective medical findings; and

(iii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) ~~Beginning July 1, 2003, the~~ The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 375 weeks.

(4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (4) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 3%; if a worker was

performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 2%.

(6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(7) An impairment award may be paid biweekly or in a lump sum at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements of 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate established by the department pursuant to 39-71-741(3).

~~(7)(8)~~ If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

~~(8)(9)~~ If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan.

~~(9)(10)~~ As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 20 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently."

Section 9. Section 39-71-741, MCA, is amended to read:

"39-71-741. Compromise settlements and lump-sum payments. (1) By written agreement ~~filed with the department~~, benefits under this chapter may be converted in whole or in part into a lump sum. An agreement that settles a claim for any type of benefit is subject to department approval. Lump-sum advances and payment of accrued benefits in a lump sum, except permanent total disability benefits under subsection (1)(c), are not subject to department approval. If the department fails to approve or disapprove the agreement in writing within 14 days of the filing with the department, the agreement is approved. The department shall directly notify a claimant of a department order approving or disapproving a claimant's compromise or lump-sum payment. Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department. The department may approve an agreement to convert the following benefits to a lump sum only under the following conditions:

(a) all benefits if a claimant and an insurer dispute the initial compensability of an injury and there is a reasonable dispute over compensability;

(b) permanent partial disability benefits if an insurer has accepted initial liability for an injury. The total of any permanent partial lump-sum conversion in part that is awarded to a claimant prior to the claimant's final award may not exceed the anticipated award under 39-71-703. The department may disapprove an agreement under this subsection (1)(b) only if the department determines that the lump-sum conversion amount is inadequate.

(c) permanent total disability benefits if the total of all lump-sum conversions in part that are awarded to a claimant do not exceed \$20,000. The approval or award of a lump-sum permanent total disability payment in whole or in part by the department or court must be the exception. It may be given only if the worker has demonstrated financial need that:

(i) relates to:

(A) the necessities of life;
(B) an accumulation of debt incurred prior to the injury; or
(C) a self-employment venture that is considered feasible under criteria set forth by the department; or
(ii) arises subsequent to the date of injury or arises because of reduced income as a result of the injury; ~~or~~
(d) except as otherwise provided in this chapter, all other compromise settlements and lump-sum payments agreed to by a claimant and insurer; or
(e) medical benefits on an accepted claim if a claimant and an insurer dispute the insurer's continued liability for medical benefits and there is a reasonable dispute over the medical compensability.

(2) Any lump-sum conversion of benefits under this section must be converted to present value using the rate prescribed under subsection (3) (b) .

(3) (a) An insurer may recoup any lump-sum payment amortized at the rate established by the department, prorated biweekly over the projected duration of the compensation period.

(b) The rate adopted by the department must be based on the average rate for United States 10-year treasury bills in the previous calendar year.

(c) If the projected compensation period is the claimant's lifetime, the life expectancy must be determined by using the most recent table of life expectancy as published by the United States national center for health statistics.

(4) A dispute between a claimant and an insurer regarding the conversion of biweekly payments into a lump sum is considered a dispute for which a mediator and the workers' compensation court have jurisdiction to make a determination. If an insurer and a claimant agree to a compromise and release settlement or a lump-sum payment

but the department disapproves the agreement, the parties may request the workers' compensation court to review the department's decision."

Section 10. Section 39-71-1006, MCA, is amended to read:

"39-71-1006. Rehabilitation benefits. (1) A worker is eligible for rehabilitation benefits if:

(a) (i) the worker meets the definition of a disabled worker as provided in 39-71-1011; or

(ii) the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater, as established by objective medical findings, and has no actual wage loss;

(b) a rehabilitation provider, as designated by the insurer, certifies that the worker has reasonable vocational goals and reasonable reemployment opportunity. If eligible because of an impairment rating of 15% or more, with rehabilitation the worker will have a reasonable increase in the worker's wage compared to the wage that the worker received at the time of injury. If eligible because of a wage loss, the worker will have a reasonable reduction in the worker's actual wage loss with rehabilitation.

(c) a rehabilitation plan is agreed upon by the worker and the insurer and a written copy of the plan is provided to the worker. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning date and a completion date. The plan must specify the cost of tuition, fees, books, and other reasonable and necessary retraining expenses required to complete the plan.

(2) A disabled worker is entitled to receive biweekly compensation rehabilitation benefits at the worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. The rehabilitation plan must be completed within 26 weeks of the completion date specified in the plan. Rehabilitation benefits must be paid biweekly while the worker is satisfactorily progressing in the agreed-upon rehabilitation plan. ~~Benefits~~ Rehabilitation benefits payable

pursuant to a retraining rehabilitation plan under this section are not subject to the lump-sum provisions of 39-71-741 payable in a lump sum. Rehabilitation benefits may be paid in a lump sum for job placement services or if there is a reasonable dispute over rehabilitation benefit entitlement.

(3) In addition to rehabilitation benefits payable under subsection (2), a disabled worker who was injured on or after July 1, 1997, is entitled to receive payment for tuition, fees, books, and other reasonable and necessary retraining expenses, excluding travel and living expenses paid pursuant to the provisions of 39-71-1025, as set forth in department rules and as specified in the rehabilitation plan. Expenses must be paid directly by the insurer.

(4) A worker may not receive temporary total benefits and the benefits under subsection (2) during the same period of time.

(5) A rehabilitation provider authorized by the insurer shall continue to assist the injured worker until the rehabilitation plan is completed.

(6) To be eligible for benefits under this section, a worker is required to begin the rehabilitation plan within 78 weeks of reaching maximum medical healing.

(7) A worker may not receive both wages and rehabilitation benefits without the written consent of the insurer. A worker who receives both wages and rehabilitation benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301."

NEW SECTION. Section 11. Repealer. Sections 39-71-302, 39-71-303, 39-71-308, and 39-71-318, MCA, are repealed.

NEW SECTION. Section 12. Effective date -- applicability. [This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

- END -

INTRODUCED BY

BY REQUEST OF THE ECONOMIC AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT SIMPLIFYING AND CLARIFYING THE WORKERS' COMPENSATION ACT; CHANGING THE TERM "AVERAGE WEEKLY WAGE" TO "STATE'S AVERAGE WEEKLY WAGE"; AMENDING SECTIONS 17-6-317, 17-6-318, 39-11-103, 39-11-202, 39-71-116, 39-71-118, 39-71-401, 39-71-2211, AND 39-71-2312, MCA; REPEALING SECTIONS 39-71-221, 39-71-222, 39-71-416, 39-71-426, 39-71-427, 39-71-428, 39-71-801, 39-71-802, 39-71-803, 39-71-804, 39-71-805, 39-71-806, 39-71-807, 39-71-808, 39-71-809, 39-71-810, 39-71-811, 39-71-812, AND 39-71-813, MCA; AND PROVIDING AN EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 17-6-317, MCA, is amended to read:

"17-6-317. Participation by private financial institutions -- rulemaking. (1) (a) The board may jointly participate with private financial institutions in making loans to a business enterprise if the loan will:

- (i) result in the creation of a business estimated to employ at least 10 people in Montana on a permanent, full-time basis;
- (ii) result in the expansion of a business estimated to employ at least an additional 10 people in Montana on a permanent, full-time basis; or
- (iii) prevent the elimination of the jobs of at least 10 Montana residents who are permanent, full-time employees of the business.

(b) Loans under this section may be made only to business enterprises that are producing or will produce value-added products or commodities.

(c) A loan made pursuant to this section does not qualify for a job credit interest rate reduction under 17-6-318.

(2) A loan made pursuant to this section may not exceed 1% of the coal severance tax permanent fund and must comply with each of the following requirements:

(a) (i) The business enterprise seeking a loan must have a cash equity position equal to at least 25% of the total loan amount.

(ii) A participating private financial institution may not require the business to have an equity position greater than 50% of the total loan amount.

(iii) If additional security or guarantees, exclusive of federal guarantees, are required to cover a participating private financial institution, then the additional security or guarantees must be proportional to the amount loaned by all participants, including the board of investments.

(b) The board shall provide 75% of the total loan amount.

(c) The term of the loan may not exceed 15 years.

(d) The board shall charge interest at the following annual rate:

(i) 2% for the first 5 years if 15 or more jobs are created or retained;

(ii) 4% for the first 5 years if 10 to 14 jobs are created or retained;

(iii) 6% for the second 5 years; and

(iv) the board's posted interest rate for the third 5 years, but not to exceed 10% a year.

(e) (i) The interest rates in subsections (2)(d)(i) and (2)(d)(ii) become effective when the board receives certification that the required number of jobs has been created or as provided in subsection

(2)(e)(ii). If the board disburses loan proceeds prior to creation of the required jobs, the loan must bear interest at the board's posted rate.

(ii) In establishing interest rates under subsections (2)(d)(i) and (2)(d)(ii) for preventing the elimination of jobs, the board shall require the submission of financial data that allows the board to determine if the loan and interest rate will in fact prevent the elimination of jobs.

(f) If a business entitled to the interest rate in subsection (2)(d)(i) or (2)(d)(ii) reduces the number of required jobs, the board may apply a graduated scale to increase the interest rate, not to exceed the board's posted rate.

(g) For purposes of calculating job creation or retention requirements, the board shall use the state's average weekly salary wage, as defined in 39-71-116, multiplied by the number of jobs required. This calculated number is the minimum aggregate salary threshold that is required to be eligible for a reduced interest rate. If individual jobs created pay less than the state's average weekly salary wage, the borrower shall create more jobs to meet the minimum aggregate salary threshold. If fewer jobs are created or retained than required in subsection (2)(d)(i) or (2)(d)(ii) but aggregate salaries meet the minimum aggregate salary threshold, the borrower is eligible for the reduced interest rate. A job paying less than the minimum wage, provided for in 39-3-409, may not be included in the required number of jobs.

(h) (i) A participating private financial institution may charge interest in an amount equal to the national prime interest rate, adjusted on January 1 of each year, but the interest rate may not be less than 6% or greater than 12%.

(ii) At the borrower's discretion, the borrower may request the lead lender to change this prime rate to an adjustable or fixed rate on terms acceptable to the borrower and lender.

(iii) A participating private financial institution, or lead private financial institution if more than one is participating, may charge a 0.5% annual service fee.

(i) The business enterprise may not be charged a loan prepayment penalty.

(j) The loan agreement must contain provisions providing for pro rata lien priority and pro rata liquidation provisions based upon the loan percentage of the board and each participating private lender.

(3) If a portion of a loan made pursuant to this section is for construction, disbursement of that portion of the loan must be made based upon the percentage of completion to ensure that the construction portion of the loan is advanced prior to completion of the project.

(4) A private financial institution shall participate in a loan made pursuant to this section to the extent of 85% of its lending limit or 25% of the loan, whichever is less. However, the board's participation in the loan must be 75% of the loan amount.

(5) A business enterprise receiving a loan under the provisions of this section may not pay bonuses or dividends to investors until the loan has been paid off, except that incentives may be paid to employees for achieving performance standards or goals.

(6) The board may adopt rules that it considers necessary to implement this section."

Section 2. Section 17-6-318, MCA, is amended to read:

"17-6-318. Job credit interest rate reduction for business loan participation. (1) A borrower who uses the proceeds of a business loan participation funded under the provisions of this part to create jobs employing Montana residents is entitled to a job credit interest rate reduction for each job created to employ a Montana resident. A borrower who uses the proceeds of a loan made pursuant to 17-6-309(2) to create jobs is entitled to a job credit interest rate reduction for each job created. The job credit interest rate reduction is equal

to 0.05% for each job created to employ a Montana resident, up to a maximum interest rate reduction of 2.5%.

(2) If the salary or wage of the job created:

(a) exceeds the state's average weekly wage, as defined in 39-71-116, the amount of the job credit interest rate reduction may be increased proportionately for each increment of 25% above the state's average weekly wage to a maximum of two times the state's average weekly wage; or

(b) is less than the state's average weekly wage, as defined in 39-71-116, the job credit interest rate reduction is reduced proportionately for each 25% increment below the state's average weekly wage.

(3) A job credit interest rate reduction may not be allowed for a job created by the borrower using the proceeds of the loan for which the salary or wage is less than the minimum wage provided for in 39-3-409.

(4) A job credit may not be given unless one whole job is created.

(5) To qualify for the job credit interest rate reduction, the borrower shall provide satisfactory evidence of the creation of jobs and shall make a written application to the board through its financial institution or, in the case of a loan made pursuant to 17-6-309(2), shall make a written application directly to the board."

Section 3. Section 39-11-103, MCA, is amended to read:

"39-11-103. (Temporary) Definitions. As used in this chapter, the following definitions apply:

~~(1) "Average weekly wage" has the meaning provided in 39-71-116.~~

~~(2)(1)~~ "Eligible training provider" means:

(a) a unit of the university system, as defined in 20-25-201;

(b) a community college district, as defined in 20-15-101;

(c) an accredited, tribally controlled community college located in the state of Montana; or

(d) an entity approved to provide workforce training that is included on the eligible training provider list.

~~(2)~~ (2) "Eligible training provider list" means the list maintained by the department of labor and industry of those eligible training providers who may be used to provide workforce training under a grant authorized in 39-11-202.

~~(3)~~ (3) "Employee" means the individual employed in a new job.

~~(4)~~ (4) "Employer" means the individual, corporation, partnership, or association providing new jobs and entering into a grant contract.

~~(5)~~ (5) "Full-time job" means a predominantly year-round position requiring an average of 35 hours of work each week.

~~(6)~~ (6) (a) "New job" means a newly created full-time job in an eligible business.

(b) The term does not include:

(i) jobs for recalled employees returning to positions held previously, for replacement employees, or for employees newly hired as a result of a labor dispute, part-time or seasonal jobs, or other jobs that previously existed within the employment of the employer in the state; or

(ii) jobs created by an employer as the result of an acquisition of a Montana company or entity if those jobs previously existed in the state of Montana in the acquired company or entity unless it is demonstrated that the jobs:

(A) are substantially different as a result of the acquisition; and
(B) will require new training for the employee to meet new job requirements.

~~(7)~~ (7) "New jobs credit" means the credit provided in 39-11-203.

~~(8)~~ (8) "Office of economic development" means the office of economic development established in 2-15-218.

~~447(9)~~ "Primary sector business" means an employer engaged in expanding operations within Montana that through the employment of knowledge or labor adds value to a product, process, or export service that results in the creation of new wealth and for which at least 50% of the sales of the employer occur outside of Montana or the employer is a manufacturing company with at least 50% of its sales to other Montana companies that have 50% of their sales occurring outside of Montana.

~~447(10)~~ "Primary sector business training program" or "program" means the grant provided to employers for the purpose of working with eligible training providers to provide employees with education and training required for jobs in new or expanding primary sector businesses in the state.

~~447(11)~~ (a) "Program costs" means all necessary and incidental costs of providing program services.

(b) The term does not include the cost of purchase of equipment to be owned or utilized by the eligible training provider.

~~447(12)~~ "Program services" means training and education specifically directed to the new jobs, including:

- (a) all direct training costs, such as:
- (i) program promotion;
- (ii) instructor wages, per diem, and travel;
- (iii) curriculum development and training materials;
- (iv) lease of training equipment and training space;
- (v) miscellaneous direct training costs;
- (vi) administrative costs; and
- (vii) assessment and testing;
- (b) in-house or on-the-job training; and
- (c) subcontracted services with eligible training providers.

13 "State's average weekly wage" has the meaning provided in 39-71-116. (Terminates June 30, 2007--sec. 10, Ch. 567, L. 2003.)"

Section 4. Section 39-11-202, MCA, is amended to read:

"39-11-202. (Temporary) Primary sector business workforce training grants -- eligibility. (1) The grant review committee provided for in 39-11-201 may award workforce training grants to primary sector businesses that provide education or skills-based training, through eligible training providers from the eligible training provider list, for employees in new jobs.

(2) To be eligible for a grant, an applicant shall demonstrate that at least 50% of the applicant's sales will be from outside of Montana or that the applicant is a manufacturing company with 50% of its sales from companies that have 50% of their sales outside of Montana and must meet at least one of the following criteria:

- (a) be a value-adding business as defined by the Montana board of investments;
 - (b) demonstrate a significant positive economic impact to the region and state beyond the job creation involved;
 - (c) provide a service or function that is essential to the locality or the state; or
 - (d) be a for-profit or a nonprofit hospital or medical center providing a variety of medical services for the community or region.
- (3) An applicant shall also provide a match of at least \$1 for every \$3 requested. The match:
- (a) must be from new, unexpended funds available at the time of application;
 - (b) may include new loans and investments and expenditures for direct project-related costs such as new equipment and buildings. The committee may consider recent purchases of fixed assets directly related to the proposal on a case-by-case basis. A purchase of fixed assets directly related to the proposed training activities that have been made within 90 days after submission of the application may be considered eligible by the department.

(4) (a) Except as provided in subsection (4)(c), a grant provided under this section may not exceed \$5,000 for each full-time position for which an employee is being trained. A grant may be provided only for a new job ~~that has~~ for which an average weekly wage is paid that meets or exceeds the lesser of Montana's the current state's average weekly wage, the current average weekly wage of the county in which the employees are to be principally employed, or for jobs that will be principally located on a reservation, the current average weekly wage of the reservation.

(b) The office of economic development may consider the value of employee benefits in calculating the expected annual wage.

(c) The committee may, in exceptional circumstances, consider a higher grant ceiling for jobs that will pay significantly higher wages and benefits if the need for higher training costs is documented in the application.

(d) A grant provided under this section may not exceed an amount greater than the present value of expected incremental tax receipts, as described in 39-11-203, that are expected over the 10-year period immediately following the grant award. The committee shall consider the loan rate established by the board of investments pursuant to the Municipal Finance Consolidation Act of 1983 that is in effect at the time of the grant and the state personal income tax rates in effect or those rates scheduled to take effect in calculating the maximum grant amount.

(5) A primary sector business workforce training program must involve at least 10 new jobs unless unique circumstances are documented that indicate a significant, positive, secondary impact to the local economy. Funding ceilings will be determined by the availability of funding, the cost for each job, and the quality of the primary sector business proposal.

(6) The grant application, at a minimum, must contain:

(a) a business plan containing information that is sufficient for the committee to obtain an adequate understanding of the business to be assisted, including the products or services offered, estimated

market potential, management experience of principals, current financial position, and details of the proposed venture. In lieu of a business plan, the committee may consider a copy of the current loan application to entities such as the Montana board of investments, the federal business and industry guarantee program, or the small business administration.

(b) financial statements and projections for the 2 most recent years of operation and projections for each of the 2 years following the grant, including but not limited to balance sheets, profit and loss statements, and cash flow statements. A business operating for less than 2 years shall provide all available financial statements.

(c) a hiring and training plan, which must include:

(i) a breakdown of the jobs to be created or retained, including the number and type of jobs that are full-time, part-time, skilled, semiskilled, or unskilled positions;

(ii) a timetable for creating the positions and the total number of employees to be hired;

(iii) an assurance that the business will comply with the equal opportunity and nondiscrimination laws;

(iv) procedures for outreach, recruitment, screening, training, and placement of employees;

(v) a description of the training curriculum and resources;

(vi) written commitments from any agency or organization participating in the implementation of the hiring plan; and

(vii) a description of the type and method of training to be provided to employees, the starting wage and wage to be paid after training for each position, the job benefits to be paid or provided, and any payment to eligible training providers.

(7) If the committee determines that an applicant meets the criteria established in this section and has complied with the applicable procedures and review processes established by the committee, the committee may award a primary sector business workforce development

grant to the employer and authorize the disbursement of funds to the primary sector business.

(8) (a) A contract with a grant recipient must contain provisions:

(i) certifying that the full amount of the grant will be reimbursed in the event that the primary sector business ceases operation within 12 months from the time that the grant is awarded;

(ii) requiring the employer receiving the grant to repay any shortfall in the personal income tax revenues to the state, as calculated in 39-11-203, that are the result of the company failing to meet the number of jobs or pay level of those jobs described in the final grant application. A shortfall in any fiscal year must be accessed against and paid by the company in the next fiscal year.

(iii) providing the department with annual reports and a final closeout report that documents the higher wages paid to an employee upon completion of the training.

(b) The contract must be signed by the person in the primary sector business who is assigned the duties and responsibilities for training and the overall success of the program and by the primary sector business's chief executive. (Terminates June 30, 2007--sec. 10, Ch. 567, L. 2003.)"

Section 5. Section 39-71-116, MCA, is amended to read:

"39-71-116. Definitions. Unless the context otherwise requires, in this chapter, the following definitions apply:

(1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.

(2) "Administer and pay" includes all actions by the state fund under the Workers' Compensation Act and the Occupational Disease Act of Montana necessary to:

(a) investigation, review, and settlement of claims;

(b) payment of benefits;

(c) setting of reserves;

(d) furnishing of services and facilities; and

(e) use of actuarial, audit, accounting, vocational rehabilitation, and legal services.

(3) "Aid or sustenance" means a public or private subsidy made to provide a means of support, maintenance, or subsistence for the recipient.

~~(4) "Average weekly wage" means the mean weekly earnings of all employees under covered employment, as defined and established annually by the department. It is established at the nearest whole dollar number and must be adopted by the department before July 1 of each year.~~

~~(5)~~ (4) "Beneficiary" means:

(a) a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury;

(b) an unmarried child under 18 years of age;

(c) an unmarried child under 22 years of age who is a full-time student in an accredited school or is enrolled in an accredited apprenticeship program;

(d) an invalid child over 18 years of age who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of injury;

(e) a parent who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of the injury if a beneficiary, as defined in subsections ~~(5)(a)~~ (4)(a) through ~~(5)(d)~~ (4)(d), does not exist; and

(f) a brother or sister under 18 years of age if dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of the injury but only until the age of 18 years and only when a beneficiary, as defined in subsections ~~(5)(a)~~ (4)(a) through ~~(5)(e)~~ (4)(e), does not exist.

~~447~~(5) "Business partner" means the community, governmental entity, or business organization that provides the premises for work-based learning activities for students.

~~447~~(6) "Casual employment" means employment not in the usual course of the trade, business, profession, or occupation of the employer.

~~447~~(7) "Child" includes a posthumous child, a dependent stepchild, and a child legally adopted prior to the injury.

~~447~~(8) (a) "Construction industry" means the major group of general contractors and operative builders, heavy construction (other than building construction) contractors, and special trade contractors listed in major group 23 in the North American Industry Classification System Manual.

(b) The term does not include office workers, design professionals, salespersons, estimators, or any other related employment that is not directly involved on a regular basis in the provision of physical labor at a construction or renovation site.

~~447~~(9) "Days" means calendar days, unless otherwise specified.

~~447~~(10) "Department" means the department of labor and industry.

~~447~~(11) "Fiscal year" means the period of time between July 1 and the succeeding June 30.

~~447~~(12) (a) "Household or domestic employment" means employment of persons other than members of the household for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work, ~~but~~.

(b) The term does not include employment beyond the scope of normal household or domestic duties, such as home health care or domiciliary care.

~~447~~(13) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

~~447~~(14) "Invalid" means one who is physically or mentally incapacitated.

~~447~~(15) "Limited liability company" ~~is as defined~~ has the meaning provided in 35-8-102.

~~447~~(16) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.

~~447~~(17) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

~~447~~(18) "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.

~~447~~(19) "Order" means any decision, rule, direction, requirement, or standard of the department or any other determination arrived at ~~or decision made~~ by the department.

~~447~~(20) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

~~447~~(21) "Payroll", "annual payroll", or "annual payroll for the preceding year" means the average annual payroll of the employer for the preceding calendar year or, if the employer has not operated a sufficient or any length of time during the calendar year, 12 times the average monthly payroll for the current year. However, an estimate may be made by the department for any employer starting in business if average payrolls are not available. This estimate must be adjusted by additional payment by the employer or refund by the department, as the case may actually be, on December 31 of the current year. An employer's payroll must be computed by calculating all wages, as defined in 39-71-123, that are paid by an employer.

~~447~~(22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

- (a) has a permanent impairment established by objective medical findings;
- (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
- (c) has an actual wage loss as a result of the injury.

~~(24)(23)~~ "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

~~(25) The "plant of the employer" includes the place of business of a third person while the employer has access to or control over the place of business for the purpose of carrying on the employer's usual trade, business, or occupation.~~

~~(26)(24)~~ "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

~~(27)(25)~~ "Public corporation" means the state or a county, municipal corporation, school district, city, city under a commission form of government or special charter, town, or village.

~~(28)(26)~~ "Reasonably safe place to work" means that the place of employment has been made as free from danger to the life or safety of the employee as the nature of the employment will reasonably permit.

~~(29)(27)~~ "Reasonably safe tools and appliances" are tools and appliances that are adapted to and that are reasonably safe for use for the particular purpose for which they are furnished.

~~(30)(28)~~ (a) "Secondary medical services" means those medical services or appliances that are considered not medically necessary

for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

(b) (i) As used in this subsection ~~(30)~~ (28), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

(ii) Disability does not mean a purely medical condition.

~~(31)(29)~~ "Sole proprietor" means the person who has the exclusive legal right or title to or ownership of a business enterprise.

~~(32)~~ (30) "State's average weekly wage" means the mean weekly earnings of all employees under covered employment, as defined and established annually by the department before July 1 and rounded to the nearest whole dollar number.

~~(33)(31)~~ "Temporary partial disability" means a physical condition resulting from an injury, as defined in 39-71-119, in which a worker, prior to maximum healing:

(a) is temporarily unable to return to the position held at the time of injury because of a medically determined physical restriction;

(b) returns to work in a modified or alternative employment; and

(c) suffers a partial wage loss.

~~(34)(32)~~ (32) "Temporary service contractor" means a person, firm, association, partnership, limited liability company, or corporation conducting business that hires its own employees and assigns them to clients to fill a work assignment with a finite ending date to support or supplement the client's workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

~~437~~ (33) "Temporary total disability" means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

~~457~~ (34) "Temporary worker" means a worker whose services are furnished to another on a part-time or temporary basis to fill a work assignment with a finite ending date to support or supplement a workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

~~467~~ (35) "Treating physician" means a person who is primarily responsible for the treatment of a worker's compensable injury and is:

(a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located;

(b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

(c) a physician assistant-certified licensed by the state of Montana under Title 37, chapter 20, if there is not a treating physician, as provided for in subsection ~~467~~(a) (35)(a), in the area where the physician assistant-certified is located;

(d) an osteopath licensed by the state of Montana under Title 37, chapter 3;

(e) a dentist licensed by the state of Montana under Title 37, chapter 4;

(f) for a claimant residing out of state or upon approval of the insurer, a treating physician defined in subsections ~~467~~(a) (35)(a) through ~~467~~(e) (35)(e) who is licensed or certified in another state; or

(g) an advanced practice registered nurse licensed by the state of Montana under Title 37, chapter 8, recognized by the board of nursing as a nurse practitioner or a clinical nurse specialist, and practicing in consultation with a physician licensed under Title 37,

chapter 3, if there is not a treating physician, as provided for in subsection ~~467~~(a) (35)(a), in the area in which the advanced practice registered nurse is located.

~~477~~ (36) "Work-based learning activities" means job training and work experience conducted on the premises of a business partner as a component of school-based learning activities authorized by an elementary, secondary, or postsecondary educational institution.

~~487~~ (37) "Year", unless otherwise specified, means calendar year."

Section 6. Section 39-71-118, MCA, is amended to read:

"39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1) ~~the~~ As used in this chapter, the term "employee" or "worker" means:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in 39-71-401(2), while rendering actual service for the corporations for pay. Casual employees, as defined by 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic employment is excluded.

(b) any juvenile who is performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program;

(c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training under a state or federal vocational training program, whether or not under an appointment or

contract of hire with an employer, as defined in ~~this chapter~~ 39-71-117, and, except as provided in subsection (9), whether or not receiving payment from a third party. However, this subsection (1)(c) does not apply to students enrolled in vocational training programs, as outlined in this subsection, while they are on the premises of a public school or community college.

(d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

(e) a person, other than a juvenile as defined described in subsection (1)(b), who is performing community service for a nonprofit organization or association or for a federal, state, or local government entity under a court order, or an order from a hearings officer as a result of a probation or parole violation, whether or not under appointment or contract of hire with an employer, as defined in ~~this chapter~~ 39-71-117, and whether or not receiving payment from a third party. For a person covered by the definition in this subsection (1)(e):

(i) compensation benefits must be limited to medical expenses pursuant to 39-71-704 and an impairment award pursuant to 39-71-703 that is based upon the minimum wage established under Title 39, chapter 3, part 4, for a full-time employee at the time of the injury; and

(ii) premiums must be paid by the employer, as defined in 39-71-117(3), and must be based upon the minimum wage established under Title 39, chapter 3, part 4, for the number of hours of community service required under the order from the court or hearings officer.

(f) an inmate working in a federally certified prison industries program authorized under 53-1-301;

(g) a person who is an enrolled member of a volunteer fire department, as described in 7-33-4109, or a person who provides ambulance services under Title 7, chapter 34, part 1; and

(h) a person placed at a public or private entity's worksite pursuant to 53-4-704 is considered an employee for workers'

compensation purposes only. The department of public health and human services shall provide workers' compensation coverage for recipients of financial assistance, as defined in 53-4-201, or for participants in the food stamp program, as defined in 53-2-902, who are placed at public or private worksites through an endorsement to the department of public health and human services' workers' compensation policy naming the public or private worksite entities as named insureds under the policy. The endorsement may cover only the entity's public assistance participants and may only be for the duration of each participant's training while receiving financial assistance or while participating in the food stamp program under a written agreement between the department of public health and human services and each public or private entity. The department of public health and human services may not provide workers' compensation coverage for individuals who are covered for workers' compensation purposes by another state or federal employment training program. Premiums and benefits must be based upon the wage that a probationary employee is paid for work of a similar nature at the assigned worksite.

(2) The terms defined in subsection (1) do not include a person who is:

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment;

(b) performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities;

(c) performing services as a volunteer, except for a person who is otherwise entitled to coverage under the laws of this state. As used in this subsection (2)(c), "volunteer" means a person who performs services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined in 39-71-123.

(d) serving as a foster parent, licensed as a foster care provider in accordance with 52-2-621, and providing care without wage

compensation to no more than six foster children in the provider's own residence. The person may receive reimbursement for providing room and board, obtaining training, respite care, leisure and recreational activities, and providing for other needs and activities arising in the provision of in-home foster care.

(3) With the approval of the insurer, an employer may elect to include as an employee under the provisions of this chapter any volunteer as defined in subsection (2)(c).

(4) (a) The term "volunteer firefighter" means a firefighter who is an enrolled and active member of a fire company organized and funded by a county, a rural fire district, or a fire service area.

(b) The term "volunteer hours" means all the time spent by a volunteer firefighter in the service of an employer, including but not limited to training time, response time, and time spent at the employer's premises.

(5) (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a member-managed limited liability company, the employer may elect to include as an employee within the provisions of this chapter any member of the partnership or limited liability partnership, the owner of the sole proprietorship, or any member of the limited liability company devoting full time to the partnership, limited liability partnership, proprietorship, or limited liability company business.

(b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the partners, sole proprietor, or members to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this

subsection (5)(d). For premium ratemaking and for the determination of the weekly wage for weekly compensation benefits, the electing employer may elect an amount of not less than \$900 a month and not more than 1 1/2 times the state's average weekly wage, ~~as defined in this chapter~~.

(6) (a) If the employer is a quasi-public or a private corporation or a manager-managed limited liability company, the employer may elect to include as an employee within the provisions of this chapter any corporate officer or manager exempted under 39-71-401(2).

(b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the corporate officer or manager to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A corporate officer or manager is not considered an employee within this chapter until notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection (5)(d). For premium ratemaking and for the determination of the weekly wage for weekly compensation benefits, the electing employer may elect an amount of not less than \$200 a week and not more than 1 1/2 times the state's average weekly wage, ~~as defined in this chapter~~.

(7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

(b) In the event of an election, the employer shall report payroll for all volunteer firefighters for premium and weekly benefit

purposes based on the number of volunteer hours of each firefighter times the average weekly wage divided by 40 hours, subject to a maximum of 1 1/2 times the state's average weekly wage.

(c) A self-employed sole proprietor or partner who has elected not to be covered under this chapter, but who is covered as a volunteer firefighter pursuant to subsection (7)(a) and when injured in the course and scope of employment as a volunteer firefighter, may in addition to the benefits described in subsection (7)(b) be eligible for benefits at an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a year. The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may make an election for benefits. If an election is made, payrolls must be reported and premiums must be assessed on the assumed wage.

(8) Except as provided in chapter 8 of this title, an employee or worker in this state whose services are furnished by a person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, to an employer, as defined in 39-71-117, is presumed to be under the control and employment of the employer. This presumption may be rebutted as provided in 39-71-117(3).

(9) A student currently enrolled in an elementary, secondary, or postsecondary educational institution who is participating in work-based learning activities and who is paid wages by the educational institution or business partner is the employee of the entity that pays the student's wages for all purposes under this chapter. A student who is not paid wages by the business partner or the educational institution is a volunteer and is subject to the provisions of this chapter.

(10) For purposes of this section, an "employee or worker in this state" means:

(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;

(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or

(d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:

(i) nonresident employees are hired in Montana;

(ii) nonresident employees' wages are paid in Montana;

(iii) nonresident employees are supervised in Montana; and

(iv) business records are maintained in Montana.

(11) An insurer may require coverage for all nonresident employees of a Montana employer who do not meet the requirements of subsection (10)(b) or (10)(d) as a condition of approving the election under subsection (10)(d)."

Section 7. Section 39-71-401, MCA, is amended to read:

"39-71-401. Employments covered and employments exempted. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers, ~~as defined in 39-71-117~~, and to all employees, ~~as defined in 39-71-118~~. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:

(a) household ~~and~~ or domestic employment;

(b) casual employment ~~as defined in 39-71-116;~~

(c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;

(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);

(e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;

(f) employment as a direct seller as defined by 26 U.S.C. 3508;

(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;

(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;

(i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;

(j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;

(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection: (2)(k):

(1) "freelance correspondent" ~~is~~ means a person who submits articles or photographs for publication and is paid by the article or by the photograph; and ~~as used in this subsection,~~

(ii) "newspaper carrier":

~~++(A)~~ ~~is~~ means a person who provides a newspaper with the service of delivering newspapers singly or in bundles; ~~but~~ and

~~+++ (B)~~ does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

(l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e);

(m) a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation;

(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;

(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing services under a license issued by the board of horseracing while on the grounds of a licensed race meet;

(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;

(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is a person who:

(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;

(ii) is paid for services that are directly related to the completion of a contracted specific task rather than on an hourly wage basis; and

(iii) performs all services as an independent contractor pursuant to a written contract.

(r) an officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company who qualifies under one or more of the following provisions:

(i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the limited liability company and does not receive any pay from the corporation or the limited liability company for performance of the duties;

(ii) the officer or manager is engaged primarily in household employment for the corporation or the limited liability company;

(iii) the officer or manager either:

(A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the limited liability company; or

(B) owns less than 20% of the number of shares of stock in the corporation or limited liability company if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or

(iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law, daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection (2)(r)(iii)(A) or (2)(r)(iii)(B).

(s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;

(t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

(u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian;

(v) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10).

(3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers' Compensation Act.

(b) The application must be made in accordance with the rules adopted by the department. There is a \$17 fee for the initial application. Any subsequent application renewal must be accompanied by a \$17 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.

(c) When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

(d) The exemption, if approved, remains in effect for 2 years following the date of the department's approval. To maintain the independent contractor status, an independent contractor shall submit a renewal application every 2 years. The renewal application and the \$17 renewal application fee must be received by the department at least 30 days before the anniversary date of the previously approved exemption.

(e) A person who makes a false statement or misrepresentation concerning that person's status as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose the penalty for each false statement or misrepresentation. The

penalty must be paid to the uninsured employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

(f) If the department denies the application for exemption, the applicant may, after mediation pursuant to department rules, contest the denial by petitioning the workers' compensation court.

(4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

(i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company; or

(ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company and to the insurer.

(b) If the employer changes plans or insurers, the employer's previous election is not effective and the employer shall again serve notice to its insurer and to its board of directors or the management organization of the manager-managed limited liability company if the employer elects to be bound.

(5) The appointment or election of an employee as an officer of a corporation, a partner in a partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability company for the purpose of exempting the employee from coverage under this chapter does not entitle the officer, partner, member, or manager to exemption from coverage.

(6) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers'

compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over the place of business or property for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

Section 8. Section 39-71-2211, MCA, is amended to read:

"39-71-2211. Premium rates for construction industry -- filing required. (1) With respect to each classification of risk in the construction industry under plan No. 2, the advisory organization designated under 33-16-1023 shall file with the commissioner of insurance a method of computing premiums that does not impose a higher insurance premium solely because of an employer's higher rate of wages paid.

(2) The commissioner shall accept a filing under subsection (1) that includes a reasonable method of recognizing differences in rates of pay. This method must use a credit scale with the starting point set at 1.168 times the ~~Montana~~ state's average weekly wage as reported by the department.

(3) The advisory organization shall file a revenue neutral plan for new and renewed policies for prompt and orderly transition to a method of computing premiums that is in compliance with the requirements of this section.

(4) The state compensation insurance fund, plan No. 3, shall adopt the plan filed by the designated advisory organization or adopt a credit scale plan that meets the requirements of this section."

Section 9. Section 39-71-2312, MCA, is amended to read:

"39-71-2312. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Board" means the board of directors of the state compensation insurance fund provided for in 2-15-1019.

~~(2) "Department" means the department of administration provided for in 2-15-1001.~~

~~(3)~~ (2) "Executive director" means the chief executive officer of the state compensation insurance fund.

~~(4)~~ (3) "State fund" means the state compensation insurance fund provided for in 39-71-2313. It is also known as compensation plan No. 3 or plan No. 3."

NEW SECTION. Section 10. Repealer. Sections 39-71-221, 39-71-222, 39-71-416, 39-71-426, 39-71-427, 39-71-428, 39-71-801, 39-71-802, 39-71-803, 39-71-804, 39-71-805, 39-71-806, 39-71-807, 39-71-808, 39-71-809, 39-71-810, 39-71-811, 39-71-812, and 39-71-813, MCA, are repealed.

NEW SECTION. Section 11. Directions to code commissioner. Section 39-71-226 is intended to be renumbered and codified as an integral part of Title 39, chapter 71, part 23.

NEW SECTION. Section 12. Effective date -- applicability. [This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

NEW SECTION. Section 13. Termination date. [Sections 3 and 4] terminate June 30, 2007.

- END -

Appendix D

SENATE BILL NO. 108 (LC 358)

INTRODUCED BY D. LEWIS

BY REQUEST OF THE ECONOMIC AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING REQUIREMENTS FOR CERTIFICATION OF INDEPENDENT CONTRACTORS; PROVIDING A CONCLUSIVE PRESUMPTION THAT AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE VERIFIES AN INDEPENDENT CONTRACTOR'S STATUS FOR PURPOSES OF WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE LAWS; PROVIDING AUTHORITY TO SUSPEND OR REVOKE CERTIFICATION; SPECIFYING VIOLATIONS AND A PENALTY; CLARIFYING THE DEFINITION OF "INDEPENDENT CONTRACTOR"; DECLARING LEGISLATIVE INTENT FOR A CONCLUSIVE PRESUMPTION REGARDING AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE; ALLOWING AN INDEPENDENT CONTRACTOR TO OPT OUT OF WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE LAWS; PROVIDING AN EXEMPTION TO THE GENERAL PROHIBITION AGAINST A WAIVER OF STATUTES; REVISING THE DISPUTE APPEAL PERIOD AND PROCESS; REPEALING A REQUIREMENT TO REPORT TO THE STATE COMPENSATION INSURANCE FUND; AMENDING SECTIONS 15-30-201, 39-8-102, 39-51-201, 39-51-204, 39-71-105, 39-71-117, 39-71-401, 39-71-409, 39-71-415, AND 39-72-102, MCA; REPEALING SECTIONS 39-51-604 AND 39-71-120, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to pay

an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision identified that a person does not have an independent business if the person performs work for only one entity; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Independent contractor certification. (1) (a) A person who regularly performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate.

(b) A person who meets the requirements of this section and receives an independent contractor exemption certificate is not required to obtain a personal workers' compensation insurance policy.

(c) For the purposes of this section, "person" means a sole proprietor, a working member of a partnership, a working member of

a limited liability partnership, or a working member of a member-managed limited liability company.

(2) The department shall adopt rules relating to an original application for or renewal of an independent contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or certificate renewal. The application or renewal must be accompanied by the fee.

(3) The department shall deposit the application or renewal fee in an account in the state special revenue fund to pay the costs of administering the program.

(4) To obtain an independent contractor exemption certificate, the applicant shall swear to and acknowledge the following:

(a) that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and

(b) that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department.

(5) An applicant for an independent contractor exemption certificate shall submit an application under oath on a form prescribed by the department and containing the following:

(a) the applicant's name and address;

(b) the applicant's social security number;

(c) each occupation for which the applicant is seeking independent contractor certification; and

(d) other documentation as provided by department rule to assist in determining if the applicant has an independently established business.

(6) The department shall issue an independent contractor exemption certificate to an applicant if the department determines that an applicant meets the requirements of this section.

(7) (a) A conclusive presumption of independent contractor status requires department approval of an application and requires the person to be working under an independent contractor exemption certificate.

(b) If both conditions in subsection (7)(a) exist, it is conclusive that the person working under an approved independent contractor exemption certificate has waived all rights and benefits under the Workers' Compensation Act and the Occupational Disease Act of Montana, precluding the person from obtaining benefits under either of those acts unless the person has elected coverage pursuant to 39-71-401(3).

(8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:

(a) suspended or revoked pursuant to [section 2]; or

(b) canceled by the independent contractor.

(9) If the department denies an application for an independent contractor exemption certificate, the applicant may contest the denial by petitioning the workers' compensation court within 30 days of the mailing of the denial.

NEW SECTION. Section 2. Suspension or revocation of independent contractor exemption certificate. (1) The department may suspend an independent contractor exemption certificate for a specific business relationship if the department determines that the employing unit exerts or retains a right of control to a degree that causes a certificate holder to violate the provisions of [section 1(4)].

(2) The department may revoke an independent contractor exemption certificate after determining that the certificate holder:

(a) provided misrepresentations in the application affidavit or certificate renewal form;

(b) altered or amended the application form, the renewal application form, other supporting documentation required by the department, or the independent contractor exemption certificate; or

(c) failed to cooperate with the department in providing information relevant to the continued validity of the holder's certificate.

(3) A decision by the department to suspend or revoke an independent contractor exemption certificate takes effect upon issuance of the decision. Suspension or revocation of the independent contractor exemption certificate does not invalidate the certificate holder's waiver of the rights and benefits of the Workers' Compensation Act and Occupational Disease Act of Montana for the period prior to notice to the hiring agent by the department of the department's decision to suspend or revoke the independent contractor exemption certificate.

(4) A decision by the department to suspend or revoke an independent contractor exemption certificate may be appealed in the same manner as provided in [section 1(9)] for denial of an application for an independent contractor exemption certificate.

NEW SECTION. Section 3. Independent contractor violations -- penalty.

(1) A person may not:

(a) perform work as an independent contractor without first obtaining from the department an independent contractor exemption certificate;

(b) perform work as an independent contractor when the department has revoked or denied the independent contractor's exemption certificate;

(c) transfer to another person or allow another person to use an independent contractor exemption certificate that was not issued to that person;

(d) alter or falsify an independent contractor exemption certificate; or

(e) misrepresent the person's status as an independent contractor.

(2) An employer may not:

(a) require an employee through coercion, misrepresentation, or fraudulent means to adopt independent contractor status to avoid the employer's obligations to provide workers' compensation coverage; or

(b) exert control to a degree that causes the independent contractor to violate the provisions of [section 1(4)].

(3) In addition to any other penalty or sanction provided in this chapter, a person or employer who violates a provision of this section is subject to a fine to be assessed by the department of up to \$1,000 for each violation. The department shall deposit the fines in the uninsured employers' fund. The lien provisions of 39-71-506 apply to any assessed fines.

(4) A person or employer who disputes a fine assessed by the department pursuant to this section may file an appeal with the department within 30 days of the date on which the fine was assessed. If, after mediation, the issue is not resolved, the issue must be transferred to the workers' compensation court for resolution.

Section 4. Section 15-30-201, MCA, is amended to read:

"15-30-201. Definitions. When used in 15-30-201 through 15-30-209, the following definitions apply:

(1) "Agricultural labor" means all services performed on a farm or ranch in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) [a] "Domestic or household service" means employment of persons other than members of the household for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work,~~but~~

(b) The term does not include employment beyond the scope of normal household or domestic duties such as home health care or domiciliary care.

(3) "Employee" means:

(a) an officer, employee, or elected public official of the United States, the state of Montana, or any political subdivision of the United States or Montana or any agency or instrumentality of the United States, the state of Montana, or a political subdivision of the United States or Montana;

(b) an officer of a corporation;

(c) any individual who performs services for another individual or organization having the right to control the employee as to the services to be performed and as to the manner of performance;

(d) all classes, grades, or types of employees including minors and aliens, superintendents, managers, and other supervisory personnel.

(4) "Employer" means:

(a) the person for whom an individual performs or performed any service, of whatever nature, as an employee of the person;

(b) a person who pays \$1,000 or more in wages within the current calendar year;

(c) a person who pays \$1,000 or more in cash for domestic or household service in any quarter during the current calendar year;

(d) any individual or organization, including state government and any of its political subdivisions or instrumentalities, partnership, association, trust, estate, joint-stock company, insurance company, limited liability company or a limited liability partnership that has filed with the secretary of state, or domestic or foreign corporation or the receiver, trustee in bankruptcy, trustee or the trustee's successor, or legal representative of a deceased person who has or had in its employ one or more individuals performing services for it within this state; or

(e) any person found to be an employer under Title 39, chapter 51, for unemployment insurance purposes is considered an employer for state income tax withholding purposes.

(5) "Independent contractor" means an individual ~~who renders service in the course of an occupation and:~~

~~(a) has been and will continue to be free from control or direction over the performance of the services, both under contract and in fact; and~~

~~(b) is engaged in an independently established trade, occupation, profession, or business working under an independent contractor exemption certificate provided for in [section 1].~~

(6) "Lookback period" means the 12-month period ending the preceding June 30.

(7) (a) "Wages", unless specifically exempted under subsection (7)(b), means all remuneration for services performed by an employee for the employer, including the cash value of all remuneration paid in any medium other than cash, and includes but is not limited to the following:

(i) commissions, bonuses, and remuneration paid for overtime work, holidays, vacations, and sickness periods;

(ii) severance or continuation pay, backpay, and any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan; and

(iii) except those tips that are exempted in subsection (7)(b)(v), tips or other gratuities received by the employee, to the extent that the tips or gratuities are documented by the employee to the employer for tax purposes.

(b) The term "wages" does not include:

(i) the amount of any payment made by the employer for employees, if the payment was made for:

(A) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

(B) sickness or accident disability under a workers' compensation policy;

(C) medical or hospitalization expenses in connection with sickness or accident disability, including health insurance for the employee or the employee's immediate family; or

(D) death, including life insurance for the employee or the employee's immediate family;

(ii) compensation in the form of meals and lodging, provided the compensation is not includable in gross income for state individual income tax purposes;

(iii) distributions from a multiple employer welfare arrangement, as defined in 29 U.S.C. 1002(40)(A), to a qualified individual employee;

(iv) payments made by an employee to any group plan or program to the extent that the payments are not taxable for state income tax purposes;

(v) tips or gratuities that are in accordance with 26 U.S.C. 3402(k) or service charges that are covered by 26 U.S.C. 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by persons for services rendered by them to patrons of premises licensed to provide food, beverage, or lodging; or

(vi) payments that may not be taxed under federal law. (Subsection (7) (b) (v) terminates on occurrence of contingency--sec. 3. Ch. 634, L. 1983.)"

Section 5. Section 39-8-102, MCA, is amended to read:

"39-8-102. Definitions. As used in this chapter, unless the context indicates otherwise, the following definitions apply:

(1) "Applicant" means a person that seeks to be licensed under this chapter.

(2) "Client" means a person that obtains all or part of its workforce from another person through a professional employer arrangement.

(3) "Controlling person" means an individual who possesses the right to direct the management or policies of a professional employer organization or group through ownership of voting securities, by contract or otherwise.

(4) "Department" means the department of labor and industry.

(5) "Employee leasing arrangement" means an arrangement by contract or otherwise under which a professional employer organization hires its own employees and assigns the employees to work for another person to staff and manage, or to assist in staffing and managing, a facility, function, project, or enterprise on an ongoing basis.

(6) "Licensee" means a person licensed as a professional employer organization or group under this chapter.

(7) "Person" means an individual, association, company, firm, partnership, corporation, or limited liability company.

(8) (a) "Professional employer arrangement" means an arrangement by contract or otherwise under which:

(i) a professional employer organization or group assigns employees to perform services for a client;

(ii) the arrangement is or is intended to be ongoing rather than temporary in nature; and

(iii) the employer responsibilities are shared by the professional employer organization or group and the client.

(b) The term does not include:

(i) services performed by a temporary service contractor;

(ii) arrangements under which a person shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended, if:

(A) that person's principal business activity is not entering into professional employer arrangements; and

(B) that person does not represent to the public that the person is a professional employer organization or group;

(iii) arrangements existing for employment of an independent contractor, ~~as defined in 39-71-120 working under an independent contractor exemption certificate provided for in [section 1];~~ and

(iv) arrangements by a health care facility, as defined in 50-5-101, to provide its own employees to perform services at and on behalf of another health care facility or at and on behalf of a private office of physicians, dentists, or other physical or mental health care workers licensed and regulated under Title 37.

(9) "Professional employer group" or "group" means at least two but not more than five professional employer organizations, each of which is majority-owned by the same person.

(10) (a) "Professional employer organization" means:

(i) a person that provides services of employees pursuant to one or more professional employer arrangements or to one or more employee leasing arrangements; or

(ii) a person that represents to the public that the person provides services pursuant to a professional employer arrangement.

(b) The term does not include a health care facility, as defined in 50-5-101, that provides its own employees to perform services at and on behalf of another health care facility or at and on behalf of a private office of physicians, dentists, or other physical or mental health care workers licensed and regulated under Title 37.

(11) "Temporary service contractor" means a person conducting a business that hires its own employees and assigns them to clients to fulfill a work assignment with a finite ending date to support or supplement the client's workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects."

Section 6. Section 39-51-201, MCA, is amended to read:

"39-51-201. General definitions. As used in this chapter, unless the context clearly requires otherwise, the following definitions apply:

(1) "Annual payroll" means the total amount of wages paid by an employer, regardless of the time of payment, for employment during a calendar year.

(2) "Base period" means the first 4 of the last 5 completed calendar quarters immediately preceding the first day of an individual's benefit year. However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state. For an individual who fails to meet the qualifications of 39-51-2105 or a similar statute of another state because of a temporary total disability, as defined in 39-71-116, or a similar statute of another state or the United States, the base period means the first 4 quarters of the last 5 completed calendar quarters preceding the disability if a claim for unemployment benefits is filed within 24 months of the date on which the individual's disability was incurred.

(3) "Benefit year", with respect to any individual, means the 52-consecutive-week period beginning with the first day of the calendar week in which the individual files a valid claim for benefits, except that the benefit year is 53 weeks if filing a new valid claim would result in overlapping any quarter of the base year of a previously filed new claim. A subsequent benefit year may not be established until the expiration of the current benefit year. However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state.

(4) "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to the individual's unemployment.

(5) "Board" means the board of labor appeals provided for in Title 2, chapter 15, part 17.

(6) "Calendar quarter" means the period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31.

(7) "Contributions" means the money payments to the state unemployment insurance fund required by this chapter but does not include assessments under 39-51-404~~(4)~~.

(8) "Department" means the department of labor and industry provided for in Title 2, chapter 15, part 17.

(9) (a) "Domestic or household service" means employment of persons other than members of the household for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work, ~~but~~.

(b) ~~The term~~ does not include employment beyond the scope of normal household or domestic duties, such as home health care or domiciliary care.

(10) "Employing unit" means any individual or organization (including the state government and any of its political subdivisions or instrumentalities or an Indian tribe or tribal unit), partnership, association, trust, estate, joint-stock company, insurance company, limited liability company or limited liability partnership that has filed with the secretary of state, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or the trustee's successor, or legal representative of a deceased person ~~that has or had in its~~ in whose employ one or more individuals ~~performing perform or performed services for it~~ within this state, except as provided under 39-51-204(1)(a) and (1)(q). All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state are considered to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or assist in performing the work of any agent or employee of an employing unit is considered to be employed by the employing unit for the purposes of this chapter, whether the individual was hired or

paid directly by the employing unit or by the agent or employee, provided that the employing unit has actual or constructive knowledge of the work.

(11) "Employment office" means a free public employment office or branch of an office operated by this state or maintained as a part of a state-controlled system of public employment offices or other free public employment offices operated and maintained by the United States government or its instrumentalities as the department may approve.

(12) "Fund" means the unemployment insurance fund established by this chapter to which all contributions and payments in lieu of contributions ~~are required to must~~ be paid and from which all benefits provided under this chapter must be paid.

(13) "Gross misconduct" means a criminal act, other than a violation of a motor vehicle traffic law, for which an individual has been convicted in a criminal court or has admitted or conduct that demonstrates a flagrant and wanton disregard of and for the rights or title or interest of a fellow employee or the employer.

(14) "Hospital" means an institution that has been licensed, certified, or approved by the state as a hospital.

(15) "Independent contractor" means an individual ~~who renders service in the course of an occupation and~~

~~(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact, and~~

~~(b) is engaged in an independently established trade, occupation, profession, or business working under an independent contractor exemption certificate provided for in [section 1].~~

(16) "Indian tribe" means an Indian tribe as defined in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b(e).

(17) (a) "Institution of higher education", for the purposes of this part, means an educational institution that:

(i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of a certificate;

(ii) is legally authorized in this state to provide a program of education beyond high school;

(iii) provides an educational program for which ~~it~~ the institution awards a bachelor's or higher degree or provides a program that is acceptable for full credit toward a bachelor's or higher degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) is a public or other nonprofit institution.

(b) Notwithstanding subsection (17)(a), all universities in this state are institutions of higher education for purposes of this part.

(18) "No-additional-cost service" has the meaning provided in section 132 of the Internal Revenue Code, 26 U.S.C. 132.

(19) "State" includes, in addition to the states of the United States of America, the District of Columbia, Puerto Rico, the Virgin Islands, and Canada.

(20) "Taxes" means contributions and assessments required under this chapter but does not include penalties or interest for past-due or unpaid contributions or assessments.

(21) "Tribal unit" means an Indian tribe and any subdivision, subsidiary, or business enterprise that is wholly owned by that tribe.

(22) "Unemployment insurance administration fund" means the unemployment insurance administration fund established by this chapter from which administrative expenses under this chapter must be paid.

(23) (a) "Wages", unless specifically exempted under subsection (23)(b), means all remuneration payable for personal services, including the cash value of all remuneration paid in any medium other

than cash. The reasonable cash value of remuneration payable in any medium other than cash must be estimated and determined pursuant to rules prescribed by the department. The term includes but is not limited to:

(i) commissions, bonuses, and remuneration paid for overtime work, holidays, vacations, and sickness periods;

(ii) severance or continuation pay, backpay, and any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan; and

(iii) tips or other gratuities received by the employee, to the extent that the tips or gratuities are documented by the employee to the employer for tax purposes.

(b) The term does not include:

(i) the amount of any payment made by the employer for employees, if the payment was made for:

(A) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

(B) sickness or accident disability under a workers' compensation policy;

(C) medical or hospitalization expenses in connection with sickness or accident disability, including health insurance for the employee or the employee's immediate family; or

(D) death, including life insurance for the employee or the employee's immediate family;

(ii) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, or other expenses, as set forth in department rules; or

(iii) a no-additional-cost service.

(24) "Week" means a period of 7 consecutive calendar days ending at midnight on Saturday.

(25) ~~An individual's~~ "weekly benefit amount" means the amount of benefits that ~~the~~ an individual would be entitled to receive for 1 week of total unemployment."

Section 7. Section 39-51-204, MCA, is amended to read:

"39-51-204. Exclusions from definition of employment. (1) The term "employment" does not include:

(a) domestic or household service in a private home, local college club, or local chapter of a college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to this chapter and has domestic or household service employment, all employees engaged in domestic or household service must be excluded from coverage under this chapter if the employer:

(i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the subject wages attributable to domestic or household service; and

(ii) keeps separate books and records to account for the employment of persons in domestic or household service.

(b) service performed by a dependent member of a sole proprietor for whom an exemption may be claimed under 26 U.S.C. 152 or service performed by a sole proprietor's spouse for whom an exemption based on marital status may be claimed by the sole proprietor under 26 U.S.C. 7703;

(c) service performed as a freelance correspondent or newspaper carrier if the person performing the service, or a parent or guardian of the person performing the service in the case of a minor, has acknowledged in writing that the person performing the service and the service are not covered. As used in this subsection:

(i) "freelance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph; and

(ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

(d) services performed by qualified real estate agents, as defined in 26 U.S.C. 3508, or insurance salespeople paid solely by commission and without a guarantee of minimum earnings;

(e) service performed by a cosmetologist or barber who is licensed under Title 37, chapter 31, and:

(i) who has acknowledged in writing that the cosmetologist or barber is not covered by unemployment insurance and workers' compensation;

(ii) who contracts with a salon or shop, as defined in 37-31-101, and the contract must show that the cosmetologist or barber:

(A) is free from all control and direction of the owner in the contract;

(B) receives payment for service from individual clientele; and

(C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or knowledge; and

(iii) whose contract gives rise to an action for breach of contract in the event of contract termination. The existence of a single license for the salon or shop may not be construed as a lack of freedom from control or direction under this subsection.

(f) casual labor not in the course of an employer's trade or business performed in any calendar quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. "Regularly employed" means that the service is performed during at least 24 days in the same quarter.

(g) service performed by sole proprietors, working members of a partnership, members of a member-managed limited liability company that has filed with the secretary of state, or partners in a limited liability partnership that has filed with the secretary of state;

- (h) service performed for the installation of floor coverings if the installer:
 - (i) bids or negotiates a contract price based upon work performed by the yard or by the job;
 - (ii) is paid upon completion of an agreed-upon portion of the job or after the job is completed;
 - (iii) may perform service for anyone without limitation;
 - (iv) may accept or reject any job;
 - (v) furnishes substantially all tools and equipment necessary to provide the service; and
 - (vi) works under a written contract that:
 - (A) gives rise to a breach of contract action if the installer or any other party fails to perform the contract obligations;
 - (B) states that the installer is not covered by unemployment insurance; and
 - (C) requires the installer to provide a current workers' compensation policy or to obtain an exemption from workers' compensation requirements;
- (i) service performed as a direct seller as defined by 26 U.S.C. 3508;
- (j) service performed by a petroleum land professional. As used in this subsection, "petroleum land professional" means a person who:
 - (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;
 - (ii) is paid for service that is directly related to the completion of a contracted specific task rather than on an hourly wage basis; and
 - (iii) performs all services as an independent contractor pursuant to a written contract.

- (k) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;
- (l) service performed by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;
- (m) service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency, any agency of a state or political subdivision of the state, or an Indian tribe by an individual receiving work relief or work training;
- (n) service performed for a state prison or other state correctional or custodial institution by an inmate of that institution;
- (o) service performed by an individual who is sentenced to perform court-ordered community service or similar work;
- (p) service performed by elected public officials;
- (q) agricultural labor, except as provided in 39-51-202(2), (4), or (6). If an employer is otherwise subject to this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded from coverage under this chapter if the employer:
 - (i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the monetary amount or number of employees and days worked for the subject wages attributable to agricultural labor; and
 - (ii) keeps separate books and records to account for the employment of persons in agricultural labor.
- (r) service performed in the employ of any other state or its political subdivisions or of the United States government or of an

instrumentality of any other state or states or their political subdivisions or of the United States, except that national banks organized under the national banking law are not entitled to exemption under this subsection and are subject to this chapter the same as state banks, if the service is excluded from employment as defined in 5 U.S.C. 8501(1)(I) and section 3306(c)(6) of the Federal Unemployment Tax Act;

(s) service in which unemployment insurance is payable under an unemployment insurance system established by an act of congress if the department enters into agreements with the proper agencies under an act of congress and those agreements become effective in the manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential rights to unemployment insurance under the act of congress, acquired rights to benefits under this chapter;

(t) service performed in the employ of a school or university if the service is performed by a student who is enrolled and is regularly attending classes at a school or university or by the spouse of a student if the spouse is advised, at the time that the spouse commences to perform the service, that the employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school or university and that the employment is not covered by any program of unemployment insurance;

(u) service performed by an individual who is enrolled at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program taken for credit at an institution that combines academic instruction with work experience if the service is an integral part of the program and the institution has certified that fact to the

employer, except that this subsection (1)(u) does not apply to service performed in a program established for or on behalf of an employer or group of employers;

(v) service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(w) service performed by an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 1101(a)(H)(ii)(a) of the Immigration and Nationality Act;

(x) service performed in a fishing rights-related activity of an Indian tribe by a member of the tribe for another member of that tribe or for a qualified Indian entity, as defined in 26 U.S.C. 7873;

(y) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian; or

(z) service performed by an individual as an official, including a timer, referee, umpire, or judge, at an amateur athletic event.

(2) An individual found to be an independent contractor by the department under the terms of ~~39-71-401(3)~~ section 11 is considered an independent contractor for the purposes of this chapter. An independent contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to 39-51-2402.

(3) This section does not apply to a state or local governmental entity, an Indian tribe or tribal unit, or a nonprofit organization defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from employment for purposes of the Federal Unemployment Tax Act."

Section 8. Section 39-71-105, MCA, is amended to read:

"39-71-105. Declaration of public policy. For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:

(1) ~~It is an~~ An objective of the Montana workers' compensation system is to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; ~~they~~ but are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

(2) It is the intent of the legislature to assert that a conclusive presumption exists that recognizes that a holder of a current, valid independent contractor exemption certificate issued by the department is an independent contractor if the person is working under the independent contractor exemption certificate. The holder of an independent contractor exemption certificate may waive the rights, benefits, and obligations of Title 39, chapters 71 and 72.

~~427~~(3) A worker's removal from the ~~work force due to~~ workforce because of a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, ~~it is~~ an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

~~437~~(4) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

~~447~~(5) Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party.

~~457~~(6) It is the intent of the legislature that stress claims, often referred to as "mental-mental claims" and "mental-physical claims", are not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, as is the case with repetitive injury claims, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system."

Section 9. Section 39-71-117, MCA, is amended to read:

"39-71-117. Employer defined. (1) "Employer" means:

(a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;

(b) any association, corporation, limited liability company, limited liability partnership, or organization that seeks permission and meets the requirements set by the department by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter; and

(c) any nonprofit association, limited liability company, limited liability partnership, or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or associations or federal, state, or local government entities.

(2) A temporary service contractor is the employer of a temporary worker for premium and loss experience purposes.

(3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:

(a) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

(4) An interstate or intrastate common or contract motor carrier that maintains a place of business in this state and uses an employee or worker in this state is considered the employer of that employee, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:

(a) the worker in this state is certified as an independent contractor as provided in ~~39-71-401~~ [section 1]; or

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation furnishing employees or workers in this state to a motor carrier has obtained Montana workers' compensation insurance on the employees or workers in Montana both at the inception of employment and during all phases of the work performed."

Section 10. Section 39-71-401, MCA, is amended to read:

"39-71-401. Employments covered and employments exempted. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:

(a) household and domestic employment;

(b) casual employment as defined in 39-71-116;

(c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;

(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);

- (e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;
- (f) employment as a direct seller as defined by 26 U.S.C. 3508;
- (g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;
- (h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;
- (i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;
- (j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;
- (k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "freelance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":
- (i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles; but
- (ii) does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.
- (l) cosmetologist's services and barber's services as **defined** referred to in 39-51-204(1)(e);
- (m) a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is

conducted solely within the exterior boundaries of an Indian reservation;

(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;

(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing services under a license issued by the board of horseracing while on the grounds of a licensed race meet;

(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;

(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is a person who:

(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;

(ii) is paid for services that are directly related to the completion of a contracted specific task rather than on an hourly wage basis; and

(iii) performs all services as an independent contractor pursuant to a written contract.

(r) an officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company who qualifies under one or more of the following provisions:

(i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the limited liability company and does not receive any pay from the corporation or the limited liability company for performance of the duties;

- (ii) the officer or manager is engaged primarily in household employment for the corporation or the limited liability company;
- (iii) the officer or manager either:
- (A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the limited liability company; or
- (B) owns less than 20% of the number of shares of stock in the corporation or limited liability company if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or
- (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law, daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection (2)(r)(iii)(A) or (2)(r)(iii)(B).
- (s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;
- (t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;
- (u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian;
- (v) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10);
- (w) employment of a person who is working under an independent contractor exemption certificate.
- (3) (a) ~~A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents~~

~~to the public that the person is an independent contractor. A person who regularly performs services at locations other than the person's own fixed business location shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers' Compensation Act unless the person has waived the rights and benefits of the Workers' Compensation Act and Occupational Disease Act of Montana by obtaining an independent contractor exemption certificate from the department pursuant to [section 1].~~

~~(b) A person who holds an independent contractor exemption certificate may purchase a workers' compensation insurance policy and with the insurer's permission elect coverage for the certificate holder.~~

~~(b) The application must be made in accordance with the rules adopted by the department. There is a \$17 fee for the initial application. Any subsequent application renewal must be accompanied by a \$17 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.~~

~~(c) When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.~~

~~(d) The exemption, if approved, remains in effect for 2 years following the date of the department's approval. To maintain the independent contractor status, an independent contractor shall submit a renewal application every 2 years. The renewal application and the \$17 renewal application fee must be received by the department at least 30 days before the anniversary date of the previously approved exemption.~~

~~(e) A person who makes a false statement or misrepresentation concerning that person's status as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose the penalty for each false statement or misrepresentation. The~~

~~penalty must be paid to the uninsured employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.~~

~~(f) If the department denies the application for exemption, the applicant may, after mediation pursuant to department rules, contest the denial by petitioning the workers' compensation court.~~

(c) For the purposes of this subsection (3), "person" means a sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company.

(4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

(i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company; or

(ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company and to the insurer.

(b) If the employer changes plans or insurers, the employer's previous election is not effective and the employer shall again serve notice to its insurer and to its board of directors or the management organization of the manager-managed limited liability company if the employer elects to be bound.

(5) The appointment or election of an employee as an officer of a corporation, a partner in a partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability company for the purpose of exempting the employee from

coverage under this chapter does not entitle the officer, partner, member, or manager to exemption from coverage.

(6) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers' compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over the place of business or property for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

Section 11. Section 39-71-409, MCA, is amended to read:

"39-71-409. Waivers by employee invalid. No (1) An agreement by an employee to waive any rights under this chapter ~~for any injury to be received shall be~~ is not valid.

(2) (a) A person who possesses and is working under a current independent contractor exemption certificate issued by the department waives all rights and benefits of the Workers' Compensation Act and Occupational Disease Act of Montana unless the person elects coverage pursuant to 39-71-401(3)(b).

(b) A waiver by reason of an independent contractor exemption certificate is an exemption to the general prohibition of waiving the advantage of a statute enacted for a public reason as provided for in 1-3-204."

Section 12. Section 39-71-415, MCA, is amended to read:

"39-71-415. Procedure for resolving disputes regarding independent contractor status. (1) If an individual, employer, or insurer has a dispute as to whether an individual is an independent contractor or an employee, ~~as defined in this chapter,~~ any party may, after mediation pursuant to department rules, petition the workers' compensation court for resolution of the dispute.

(2) If a claimant and insurer have a dispute over benefits and the dispute involves an issue of whether the claimant is an independent contractor or employee, ~~as defined in this chapter, and after mediating pursuant to department rules,~~ either party may, after mediation pursuant to department rules, petition the workers' compensation judge for resolution of the dispute in accordance with 39-71-2905.

(3) A dispute between an employer and the department involving the issue of whether a worker is an independent contractor or an employee, but not involving workers' compensation benefits, must be brought before the independent contractor central unit of the department for resolution. A decision of the independent contractor central unit is final unless a party dissatisfied with the decision appeals by filing a petition for mediation within 10 days of service of the decision. ~~A party may petition the workers' compensation court for resolution of the dispute within 45 days of the mailing of the mediator's report with the workers' compensation court within 30 days of the mailing of the decision by the independent contractor central unit.~~ An appeal from the independent contractor central unit to the workers' compensation court brought pursuant to this part is a new proceeding.

~~(4) Notwithstanding the provisions of subsection (1), an individual may apply to the department for an exemption from the Workers' Compensation Act in accordance with 39-71-401."~~

Section 13. Section 39-72-102, MCA, is amended to read:

"39-72-102. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Beneficiary" ~~is as defined~~ has the meaning provided in 39-71-116.

(2) "Child" ~~is as defined~~ has the meaning provided in 39-71-116.

(3) "Department" means the department of labor and industry.

(4) "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease from performing work in the worker's job pool. Silicosis, when complicated by active pulmonary tuberculosis, is presumed to be total disablement. "Disability", "total disability", and "totally disabled" are synonymous with "disablement"; but ~~they~~ have no reference to "permanent partial disability".

(5) "Employee" ~~is as defined~~ has the meaning provided in 39-71-118.

(6) "Employer" ~~is as defined~~ has the meaning provided in 39-71-117.

(7) "Independent contractor" ~~is as defined in 39-71-120~~ means a person who is working under an independent contractor exemption certificate provided for in Section 11.

(8) "Insurer" is as defined in 39-71-116.

(9) "Invalid" is as defined in 39-71-116.

(10) (a) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift.

(b) The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

(11) "Order" is as defined in 39-71-116.

(12) "Pneumoconiosis" means a chronic dust disease of the lungs arising out of employment in coal mines and includes anthracosis, coal workers' pneumoconiosis, silicosis, or anthracosilicosis arising out of ~~such~~ employment in coal mines.

(13) "Silicosis" means a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide ~~(§102)~~ and characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing the characteristic x-ray pattern, and by other variable clinical manifestations.

(14) "Wages" is as defined in 39-71-123.

(15) "Year" is as defined in 39-71-116."

NEW SECTION. Section 14. Repealer. Sections 39-51-604 and 39-71-120, MCA, are repealed.

NEW SECTION. Section 15. Codification instruction. [Sections 1 through 3] are intended to be codified as an integral part of Title 39, chapter 71, part 4, and the provisions of Title 39, chapter 71, part 4, apply to [sections 1 through 3].

NEW SECTION. Section 16. Effective date -- applicability. [This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act].

- END -

Appendix E

SENATE BILL NO. 12 (LC 353)

INTRODUCED BY J. MANGAN

BY REQUEST OF THE ECONOMIC AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING PORTIONS OF THE OCCUPATIONAL DISEASE ACT TO COMPLY WITH DECISIONS BY THE MONTANA SUPREME COURT; CLARIFYING PAYMENT OF ATTORNEY FEES, COMPROMISE SETTLEMENTS, AND LUMP-SUM PROVISIONS; AMENDING SECTIONS 39-72-402 AND 39-72-701, MCA; REPEALING SECTIONS 39-72-405, 39-72-703, 39-72-706, 39-72-707, 39-72-711, AND 39-72-712, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, as part of the 1987 overhaul of the Workers' Compensation Act, the Montana Legislature specified its governmental interest by adopting a declaration of public policy, codified at section 39-71-105, MCA, which declared that for purposes of interpreting and applying both the Workers' Compensation Act and the Occupational Disease Act of Montana, the objective of the Montana workers' compensation system was to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease, that wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease, and that the objective of the workers' compensation system was to return a worker to work as soon as possible after a work-related injury or disease; and

WHEREAS, in addition to adopting a declaration of public policy, the 1987 Legislature also substantially revised the definitions of "injury" and "occupational disease" by creating two classes of workers whose afflictions were classified as either "injuries" or

"occupational diseases" based solely upon the number of work shifts over which the afflictions occurred; and

WHEREAS, after the 1987 revision, the Montana Supreme Court began considering challenges from claimants alleging that the disparate legislative treatment of those workers with "injuries" and those workers with "occupational diseases" violated the equal protection guarantee of Article II, section 4, of the Montana Constitution, which requires that all persons be treated alike under like circumstances; and

WHEREAS, in 1999, the Montana Supreme Court held in *Henry v. State Compensation Insurance Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), that the elimination of workers suffering from occupational diseases from access to rehabilitation benefits that are available to injured workers violated the equal protection guarantee because it bore no rational relationship to the state's declared policy of returning workers to work as soon as possible; and

WHEREAS, in 2003, the Montana Supreme Court held in *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (2003), that the disparate treatment of disabled workers based simply on the length of time over which the workers' injury or disease is sustained violated the equal protection guarantee because it was not rationally related to the Legislature's declared policy of providing a wage loss benefit that bears a reasonable relationship to the workers' actual wage loss; and

WHEREAS, based on its *Stavenjord* decision, the Montana Supreme Court in *Schmill v. Liberty Northwest Insurance Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003), held that apportioning or reducing a worker's permanent impairment award for the worker's occupational disease while providing full benefits for a similarly injured worker under the Workers' Compensation Act violated the equal protection guarantee because it was not rationally related to the Legislature's declared policy that compensation was intended only for work-related injury or disease; and

WHEREAS, because the Montana Supreme Court has ruled that workers suffering a work-related injury on one shift and workers suffering a work-related injury on more than one shift are similarly situated for purposes of equal protection and because the Legislature has shown no rational reason to treat these workers differently, it is necessary that the Legislature, at a minimum, address the equal protection problems identified by the Montana Supreme Court in the Henry, Stavenjord, and Schmill decisions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-72-402, MCA, is amended to read:

"39-72-402. Practice and procedure -- applicability of Workers' Compensation Act. (1) Except as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act applies apply to all proceedings under this chapter.

(2) Sections 39-71-304, 39-71-403, 39-71-406, 39-71-409, 39-71-411 through 39-71-413, ~~39-71-611 through 39-71-614, 39-71-741, 39-71-742,~~ and Title 39, chapter 71, part 9, which are contained in the Workers' Compensation Act, specifically apply to and are incorporated as part of this chapter."

Section 2. Section 39-72-701, MCA, is amended to read:

"39-72-701. Compensation for total disability, temporary or permanent partial disability, vocational rehabilitation, or death due to because of occupational disease other than pneumoconiosis. (1) The compensation ~~to which an~~ that is payable to an employee with an occupational disease must be paid in the same amount and for the same time period under this chapter:

(a) to an injured employee who is:

(i) temporarily totally disabled or permanently totally disabled;

(ii) temporarily or permanently partially disabled; or

(iii) eligible for rehabilitation benefits by because of an occupational disease other than pneumoconiosis; or

(b) to the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis; are entitled under this chapter shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act.

(2) In cases where in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the disease for which temporary total and permanent total disability benefits are payable, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal as nearly as practical to one-half the federal periodic benefits for such that week, which The amount is to must be calculated from the date of the disability social security entitlement."

NEW SECTION. Section 3. Repealer. Sections 39-72-405, 39-72-703, 39-72-706, 39-72-707, 39-72-711, and 39-72-712, MCA, are repealed.

NEW SECTION. Section 4. Effective date -- applicability. [This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005.

- END -

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Sydney E. McKenna

March 18, 2004

Economic Affairs Interim Committee
P.O. Box 201706
Helena, MT 59620-1706

Dear Committee Members:

By way of introduction, I live in Missoula, Montana and practice law in the areas of personal injury and workers' compensation. Since the 1990's, a fair portion of my practice has involved representing law enforcement officers for mental injuries.

As you know, in 1987, in reaction to the perceived workers' compensation crisis, our legislature made many amendments to the workers compensation laws, including Section 39-71-119, which excludes mental injuries. I handled the first challenge to that law on behalf of a well respected law enforcement officer from Libby, named Gary Stratemeyer. Officer Stratemeyer came to my office totally disabled from post traumatic stress disorder, arising out of his attempt to rescue a young girl who had shot herself in the head. When Stratemeyer arrived at the attempted suicide scene, the girl was lying in her father's arms, bleeding from her nose, head and mouth. Stratemeyer attempted to rescue her and, in doing so, had to take her from her father, an understandable but impossible situation for him to reconcile after the girl died. Stratemeyer was plagued with guilt for depriving the father of this daughter's last moments. I attempted to challenge the workers' compensation law that discriminated against Stratemeyer on the basis that his injury was mental, not physical. It is important to understand that no one disputed that Stratemeyer was injured, that his injury was caused by this event and that he was totally disabled from ever returning to law enforcement.

However, because the statute excluded mental claims, Stratemeyer was denied medical benefits or wage loss benefits that he would have obtained had he merely injured his back. The Workers' Compensation Court held that the statute violated equal protection. On appeal, the Montana Supreme Court reversed.

Faced with a client who was totally disabled with seemingly no remedy, I filed a complaint in district court for negligence against his employer. The gist of the claim was that post traumatic stress disorder is a well known injury that people in emergency services are exposed to and that there were simple and inexpensive measures that could be taken to reduce the risk of developing such a disorder, such as critical incident stress debriefing. The case was dismissed by the district court because of the workers' compensation exclusive remedy. I appealed the case and the Montana Supreme Court reversed the district court, noting that the fundamental basis for workers giving up the right to sue, was the employers' promise to pay workers compensation benefits and, without the "quid pro quo", the exclusive remedy bar

would no longer prevent a lawsuit. In short, Stratemeyer was free to pursue his civil claim, his tort claim, in district court.

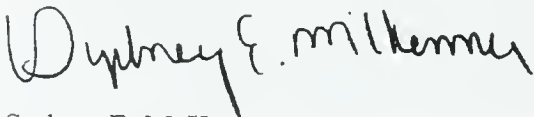
Since then, I have represented a number of law enforcement officers and other emergency personnel. While the ultimate settlements might be larger than what could be gained in a workers' compensation case, I believe that it is fundamentally unfair to treat a worker with a physical injury differently than a worker with a mental injury. Our law enforcement officers, fire fighters, highway patrol men and women, ambulance personnel and medical providers are all exposed to trauma, day in and day out. They are putting their mental health on the line each and every day. Yet, if they have an injury because of the trauma that affects their mind, they are not even allowed medical benefits from our workers compensation system. It is not right, just or fair. Also, if the injury is disabling, the worker almost has to sue in order to survive. Most of my clients enjoyed a decent living and, since their mental injuries, are lucky to hold down a convenient store job at minimum wage.

The legislature should take out the discriminatory language in Section 39-71-119, MCA, which I have attached hereto, so that our emergency personnel can access the workers' compensation system like everyone else. This would also help the employer who is presently exposed to a tort claim.

While these cases are not specifically related to Section 39-71-401 employment exemptions, the result is the same - if a worker is not covered under workers' compensation laws, then that worker will be able to sue the employer directly for injuries suffered on the job. That is not fair for workers and it exposes employers to lawsuits.

Thank you for your consideration of this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Sydney E. McKenna". The signature is written in a cursive, flowing style.

Sydney E. McKenna

Enclosure

*38666 MCA 39-71-119

**MONTANA CODE
ANNOTATED
TITLE 39. LABOR
CHAPTER 71. WORKERS'
COMPENSATION
PART 1. GENERAL**

PROVISIONS Current through
the 2003 Regular Session of the
58th Legislature

39-71-119. Injury and accident defined

(1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

~~(3) "Injury" or "injured" does not mean a~~

~~physical or mental condition arising from:~~

~~(a) emotional or mental stress; or~~

~~(b) a nonphysical stimulus or activity.~~

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) (a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.

(b) "Primary cause", as used in subsection (5)(a), means a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition.

History: Ap. p. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2870, R.C.M. 1921; re-en. Sec. 2870, R.C.M. 1935; amd. Sec. 6, Ch. 162, L. 1961; amd. Sec. 6, Ch. 149, L. 1965; amd. Sec. 1, Ch. 270, L. 1967; amd. Sec. 1, Ch. 488, L. 1973; Sec. 92-418, R.C.M. 1947; Ap. p. Sec. 2, Ch. 488, L. 1973; Sec. 92-418.1, R.C.M. 1947; (3)En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2864, R.C.M. 1921; re-en. Sec. 2864, R.C.M. 1935; Sec. 92-412, R.C.M. 1947; R.C.M. 1947, 92-412, 92-418, 92-418.1; amd. Sec. 3, Ch. 464, L. 1987; amd. Sec. 6, Ch. 243, L. 1995.

<General Materials (GM) - References, Annotations, or Tables>

**NOTES, REFERENCES, AND
ANNOTATIONS**

Compiler's Comments

1995 Amendment: Chapter 243 in (1)(a), at end, inserted "that is established by objective medical findings"; in (5)(a), in two places, substituted "condition" for "harm"; inserted (5)(b) defining primary cause; and made minor changes in style. Amendment effective July 1, 1995.

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